

Los Angeles, California
January 11 and 12, 1956.

MEMBERS

H. Allen Smith, Chairman
Richard J. Dolwig Patrick D. McGee
S. C. Masterson John A. O'Connell

Grace Stall, Secretary

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I N D E X

Page No.

Edward L. Barrett, Professor of Law, University of California	13
Roger Arnebergh, City Attorney, Los Angeles	45
Thomas C. Lynch, District Attorney, City and County of San Francisco	60
John A. Hewicker, Judge, Superior Court, San Diego County . .	77
A. L. Wirin, Attorney at Law, American Civil Liberties Union	82
Charles A. Fricke, Judge, Superior Court, Los Angeles County	101
Richard E. Erwin, Attorney at Law, Criminal Courts Bar Association	119
Walter R. Creighton, Chief, Bureau of Narcotics Enforcement, Attorney General's Office	130
Albert E. Hederman, Jr., Deputy District Attorney, Office of the Alameda County District Attorney	140
Bradford M. Crittenden, District Attorney, San Joaquin County	164
Peter J. Pitchess, Undersheriff, Los Angeles County	174
S. Ernest Roll, District Attorney, Los Angeles County	182
William H. Parker, Chief of Police, Los Angeles County . . .	230
Edward J. Allen, Chief of Police, Santa Ana	263
B. T. Mitchell, Assistant Commissioner, Federal Bureau of Narcotics	267
Carl Eggers, Chief of Police, Glendale	283
Horace V. Grayson, Chief of Police, Bakersfield	293
Mrs. Rae Suchman	295
Nathan L. Schoichet, Attorney at Law	298

SUBCOMMITTEE ON ILLEGAL SEARCHES AND SEIZURES

Police Administration Building
150 North Los Angeles Street
Los Angeles, California

January 11 and 12, 1956

MEMBERS PRESENT:

Patrick D. McGee
John A. O'Connell
H. Allen Smith, Chairman

MEMBERS ABSENT:

Richard J. Dolwig
S. C. Masterson

ALSO PRESENT:

Assemblyman Bernard R. Brady
Assemblyman Bruce F. Allen
Owen Kuns, Legislative Counsel's Office

H. ALLEN SMITH: This is a subcommittee hearing of the Assembly Judiciary Committee to study illegal searches and seizures, the laws of arrest, the exclusionary rule, and this committee also has charge of studying the subject of narcotics. The hearings are called for today and tomorrow. We have a large number of witnesses, so we will probably run late today, with not too long a lunch hour, and probably start at 9:00 o'clock tomorrow and go through all day.

We will not be able to go on into Friday or Saturday because members of this committee are also on another important committee that is starting further hearings on Friday and Saturday of this week.

The purpose of the committee is that on April 27th, 1955, the California Supreme Court, by a four to three decision, rendered the previous conviction of Charles H. Cahan, in the case of People v. Cahan, 44 A. C. 461 - they reversed his previous conviction and within a few weeks thereafter, it appeared that there was considerable

confusion in the field of criminal procedure as to what was now the law of arrest, search and seizure. Several members of the Legislature were contacted by law enforcement agencies with the request that the laws be rewritten. Although the Legislature was in session, the time before adjournment was so short that it was impossible to make any changes at the 1955 Session. Accordingly, the Assembly, by resolution, requested the Assembly Judiciary Committee to appoint a subcommittee to study the matter, and the Senate, in turn, requested the Senate Judiciary Committee to study the matter. This committee today is the Assembly Judiciary Subcommittee. In turn, we did ask the Senate Judiciary Subcommittee to sit in with us if they wished today; however, most of them are busy on other committee meetings and are unable to be here. The members of the State Legislature and those that you see in front of you are, on my extreme right Assemblyman John O'Connell from San Francisco; next to him is Assemblyman Bruce Allen from San Jose; I am H. Allen Smith from Glendale; Mrs. Grace Stall, our secretary of the Judiciary Committee; Mr. Owen Kuns of the Legislative Counsel's Office; Assemblyman Pat McGee from out San Fernando Valley way; and next to him is Assemblyman Bernard Brady from San Francisco.

It should be kept in mind that nothing can be done on this subject until the General Session in 1957 unless it appears that changes should be made during 1956, and in turn, the Governor would agree to open the call to the particular subject matter.

The State Legislature can only make the laws, we cannot enforce them. However, our understanding, and I believe I speak for the other members here today, is that the U. S. Constitution, and its amendments, as well as the California State Constitution, secures

every citizen from unreasonable search and seizure. Accordingly, a warrant, authorized upon a showing of probable cause, supported by affidavit, particularly describing the person or place to be searched and the things to be seized, must first be obtained.

A review of this situation reflects that at common law the admissibility of the evidence obtained was not affected by the illegality of the means by which it was obtained. However, in 1914, the U. S. Supreme Court, in the case of Weeks v. the United States, 232 U. S. 383, announced the rule that the use of such evidence is to be precluded if the defendant makes seasonable application for the return of the things illegally seized or upon motion to suppress. This is now known as the "exclusionary rule." It is to be noted that this is not a constitutional right but is a rule of law.

A search warrant may issue for seizure of property in which the government or public has a paramount interest, that was the holding in Gould v. United States, 225 U. S. 298; however, it may not be used for the seizure of property which has evidentiary value only, such as contracts, letters or invoices solely for the use in evidence in a subsequent criminal trial. Seizure of stolen goods, contraband, "instrumentalities of crime" and articles seized to prevent further frauds is permitted.

The Supreme Court of the United States has been very firm in upholding the exclusionary rule that any indirect or derivative use of evidence unreasonably seized is prohibited. As an example, in Silverthorne Lumber Co. v. United States, the company's offices were entered, without a warrant, and all records were seized. A motion to return the property was granted. Thereafter, the

government issued subpoenas requiring the company to produce the originals for trial. The Supreme Court held that this was indirect use of evidence obtained illegally in the original instance and thus prohibited.

Now, in the Cahan case, he was charged with conspiring to engage in horse-race bookmaking and related offenses in violation of Section 337a of the California Penal Code and was convicted. He appealed, and the Supreme Court, by a four to three decision, reversed the conviction. Most of the evidence obtained was in violation of the unreasonable search and seizure clauses of the United States and State Constitution. Some was obtained by installing microphones in certain houses, after breaking and entering, and recording conversations carried on in those houses and nearby garages. The Court also stated that in addition "there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants." Overruling prior decisions to the contrary, the California Supreme Court held that the evidence was illegally obtained and inadmissible. This was the first time that the federal exclusionary rule was invoked in California. Prior thereto, the evidence was admitted and the defendant was left to an action in damages against the officers.

It is again noted that neither the 4th nor 5th Amendment bars admission of illegally obtained evidence, nor does the Constitution of either the United States or California, and that the federal exclusionary rule is a judicially created rule. Now in Irvine v. California, 347 U. S. 128, the United States Supreme Court indicated that the state courts might well reconsider their evidentiary rules. They thought it would be wrong to upset state convictions before

giving the states an opportunity to adopt or reject the exclusionary rule. Possibly this had some effect on the California Supreme Court in the Cahan case. We don't know, but simply offer it as a comment. They further continued that, after the states have had the opportunity to reconsider their rules, the United States Supreme Court could act accordingly.

In the Cahan case, the majority opinion, in adopting the exclusionary rule, stated that remedies against police officers have failed, and that the courts have been required to participate in and condone the lawless activities of enforcement officers; further, that civil actions against officers are rare and those involving criminal prosecutions are non-existent. The majority opinion noted that in some cases officers have no choice but to secure evidence illegally, and that some criminals will escape punishment.

The Court said they were not adopting the federal rule in detail and that certain details would still have to be worked out; that the federal exclusionary rule has been arbitrary and has introduced needless confusion into the law of criminal procedure. They felt that adopting the rule need not introduce confusion into the law of criminal procedure, that, instead, it opens the door to workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.

The three dissenting justices felt that the present remedies are sufficient to give the victim adequate redress; further, that guilty persons will be freed; that, in effect, the exclusionary rule deprives society of its remedy against one lawbreaker because

he has been pursued by another; further, that the former California rule was certain and that the new rule would create great uncertainty, and that, as the majority stated, workable rules are still to be worked out. Yet, in the meantime, the trial courts have no rules to guide them. They would have preferred to retain the non-exclusionary rule and let the Legislature consider the imposition of civil liability for illegal practices upon the government agencies employing the offending officers, in addition to the liability now imposed against the officer, and that the Legislature consider fixing a minimum amount to be recovered as damages for invasion of his civil rights.

It appears to me, and I believe this committee will agree with me, that Congress can negate the exclusionary rule. No doubt the California State Legislature can do likewise. The Legislature can, if possible, devise means of discouraging illegal searches and seizures that would be so effective as to render the exclusionary rule no longer necessary.

Here, today, we want to see what the effect of the Cahan case has been, whether law enforcement, prosecutors, and the courts are confused and handicapped, and whether the Legislature can and should make any changes in the law. We realize that there may be differences of opinion among those who will appear before us, but we are sure we all respect one another's opinion, and that, collectively, we would all like to place a stop to crime if we possibly could.

There are a number of people who have been invited and I won't repeat their names. I know that your time is valuable and I hope that the committee can please you as to the time that you wish to testify.

Now, in that regard, I have anticipated opening up with Mr. Edward L. Barrett, Professor of Law of the University of California, and he had a little difficulty in his airplane and sent a wire and said he wouldn't be here until about 11:00 o'clock, so we will have to change our procedure in that regard.

A number of individuals have asked for time to make their appearance here. We are going to do the best we can to please all of you. I am certain we will be unable to do it, because there is only so much time in two days. We will take the judges whenever they come in, immediately following a witness, because many of them are coming a long way and have their calendars and are keeping other people waiting. Law enforcement officers and the rest that have staffs to operate their offices today and tomorrow will have to bear with us a little bit. In addition to that, there are a number of people that have called me and asked if they could appear, and this committee will let anybody appear who has anything to give to the committee. We are not going to get into long arguments and dissertations, or read the Constitution. We want the facts. All we can do is pass the law, and that is the purpose of this.

The hearing will be recorded and it will be written up into a transcript and made available to all members of the committee, and possibly a few copies will be available to pass around among those of you who might be interested; however, we are not in a position to expend funds to make several hundred copies.

Now, may I at this time run down the list of those who have been asked, or have offered, to appear here so that I will know who is here now that might wish to testify. I can see Roger Arnebergh of the City Attorney's office[?]. Mr. Arnebergh, about how

long do you think you would like to appear?

ROBER ARNEBERGH: About 15 minutes.

SMITH: About 15 minutes. And I can see Walter Creighton.
Mr. Creighton, about how long . . .

WALTER R. CREIGHTON: Oh, 10 or 15 minutes.

SMITH: Now, a gentleman just came up here and . . .

A. L. WIRIN: My name is A. L. Wirin; I am counsel for the
Civil Liberties Union. I would like about 15 minutes, but not
until this afternoon. I want to listen in a little first.

SMITH: All right. You prepare to go on this afternoon for
15 minutes.

Now, another gentleman, sitting next to you, came in -- were
you speaking for Mr. Wirin?

VOICE: Yes, sir.

SMITH: Now, who else is here, so that I will know those who
have been asked and those who want to appear? Yes, sir, your name,
please?

ALBERT E. HEDERMAN, JR.: I am Mr. Hederman, H-e-d-e-r-m-a-n,
representing Mr. Frank Coakley of the District Attorney's office
of Alameda County. About 15 minutes.

SMITH: I take it the Abbott case is not over and Frank could
not be here. Is that correct?

HEDERMAN. That is correct. He is still engaged in it.

SMITH: All right. Anybody else?

JUDGE HEWICKER: Judge Hewicker from San Diego.

SMIGH: Oh, yes, Judge. About how much time would you like,
please, sir?

JUDGE HEWICKER: Well, I was going to answer questions.

SMITH: No, we are going to let you make your statement here and tell us your problems.

HEWICKER: Oh, I can be through in 10 minutes.

SMITH: All right, sir, thank you. Now, understand we are not trying to rush anybody. We want to give you all the time you want, but I thought I would make some schedule here.

I see Chief Parker. Approximately about how long would you like, Chief?

CHIEF WILLIAM H. PARKER: Somewhere between 30 and 40 minutes.

SMITH: All right. Dr. Norcross, did you intend to make any statement before the committee?

DR. NORCROSS: After I listen awhile. I will talk tomorrow.

SMITH: Everybody is going to talk tomorrow afternoon after they have heard everybody else. I understand, Archie, that you were not necessarily going to make a statement.

Now, is there anybody else here at this time?

B. T. MITCHELL: Mitchell from the Federal Narcotics Bureau.

SMITH: Oh, is Mr. Mitchell here? Mr. Mitchell, approximately how long would you like, please?

MITCHELL: Not over 15 minutes.

SMITH: Now, do I have everybody who is here at this particular time?

I have here a copy of a brief of the case of People v. Cahan* as prepared by the office of the Legislative Counsel, and I would like to place that in the report as an exhibit; also, a Summary of a Comment, "The Federal Search and Seizure Exclusionary Rule," **

* Attached as Exhibit I.

** Attached as Exhibit II.

as prepared by the Legislative Counsel for me, and I would like to have that go into the report.

I have a few letters here from individuals who were invited. I want to read those into the record and attach them as exhibits before we start taking testimony.

The Honorable Vernon W. Hunt, Judge of the Municipal Court, under date of January 6th:

"Dear Mr. Smith:

"I find that we have such a heavy calendar in the felony preliminary court in which I am now presiding that it will be impossible for me to leave the court for the purpose of attending the hearings on January 11 and 12, but it occurs to me that your purposes might be just as well served if I would set forth in writing my analysis of the problem which the committee is to consider.

"By its decision in the Cahan case, the Supreme Court of this state has taken the 'hint' of the United States Supreme Court in the case of *Irvine v. California* and has not only 'reconsidered' the 'evidentiary rules' of our state courts but has expressly overruled all previous cases on the subject and has now laid down a new rule of evidence which is designed by our Supreme Court to enforce the right of privacy guaranteed by the Fourth Amendment. The Supreme Court expressly and emphatically states that 'the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted' and that such a contention 'is not properly directed at the exclusionary rule, but at the constitutional provisions themselves.' Therefore, the Supreme Court has spoken, and the matter is settled, unless the voters at some time in the future see fit to change the rule by amending our State Constitution accordingly. It is possible that even such an amendment would not operate to change the rule, because the Fourth and Fourteenth Amendments to the United States Constitution would still be in existence, and the United States Supreme Court has indicated rather strongly that if the states do not take suitable steps to deter officers from making unreasonable searches and seizures, that court may take steps to enforce the guarantees of the Fourth Amendment against the states through the Due Process Clause of the Fourteenth Amendment.

"In the closing paragraph of its opinion in the Cahan case, the Supreme Court stated that the adoption of this exclusionary rule 'opens the door to the development of

workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.' Such rules are now being developed by the Supreme Court and the District Courts of Appeal, and I believe that this method of solving the problem is preferable to an attempt to solve it by legislation or by an attempt to amend the State Constitution, for the reasons above stated.

"Trusting that this analysis of the matter may be of some value to the committee, and assuring you that if the committee especially desires my personal appearance at any time I shall be glad to co-operate, I remain

"Respectfully yours,

"Vernon W. Hunt"

Now, a letter from the Honorable Stanley Mosk, Judge of the Superior Court, dated January 9th:

"Dear Assemblyman Smith:

"I have delayed responding to your invitation of December 15 to appear before the Assembly Judiciary Subcommittee in order to make every effort to be present.

"Unfortunately, my criminal calendar in the Santa Monica Court is so crowded that I find I can not take a half day off for the purpose of appearing before your committee.

"In addition, I feel I have nothing of any great value to contribute other than to express my personal view that the Cahan decision is a wise and proper ruling on evidence and that it should be maintained.

"I am enclosing herewith a copy of an address I made to Town Hall on July 26, 1955, in which I expressed my views at considerable length on this important decision.

"You will note particularly my reference to the fact that courts have always respected the Constitutional prohibitions against forced confessions, double jeopardy, deprivation of counsel, excessive bail, cruel and unusual punishment, denial of trial by jury, and other enumerated personal guarantees. I see no justification for making any exception for unreasonable searches and seizures. It has never been clear to me why any one Constitutional prohibition is entitled to less sanctity and respect than any other.

"I concede that there may be some difficulty in obtaining evidence in some types of cases if law enforcement officers must themselves obey the law. But as I stated in my Town Hall address, officers may now 'find it necessary to use their heads instead of hobnailed boots.'

"In the event there are any further hearings after this week, and you still desire me to express my views at greater length, I shall certainly attempt to do so.

"Respectfully yours,

"Stanley Mosk
"Judge"

I am not going to read the speech, but I will attach it at the back of the report as an exhibit*, and the letter can go in the report.

A letter from the Honorable Milton D. Sapiro, Judge of the Superior Court, San Francisco. He also is sorry that he is unable to attend the hearing.

"... I do not believe the police department should be confined to horse and buggy methods in an electronic age. There must be some way of permitting them to use modern devices without the invasion of a person's constitutional rights. No one has a constitutional right to commit a crime, and law enforcement officials should have the opportunity of using modern means of detection and the law should grant such rights to them."

Another letter which I received January 10th from John F. Also, Judge of the Municipal Court in Los Angeles, who is unable to be here and it goes along the same lines. I think rather than take the time to read it, I will place it in the report.**

Now, I understand that the airplanes have arrived from San Francisco, or the north, and that Mr. Barrett and Tom Lynch, the District Attorney, are present in the audience.

* Attached as Exhibit III

** Attached as Exhibit IV

Are you sufficiently off the airplane where you would like to start our hearing now, Mr. Barrett? We are going to let you testify from over there on the corner, because then you talk to both of us and have a microphone.

Mr. Edward L. Barrett, Jr., is Professor of Law at the University of California Law School and has done considerable research on this subject, and in the October, 1955, issue of the California Law Review he had an article published entitled, "Exclusion of Evidence Obtained by Illegal Searches; a Comment on People v. Cahan." I think that the article is extremely well done, and we have asked Mr. Barrett to open up this hearing with a comment that he might have to present the subject to us; and Mr. Barrett, anything that you have to say, we will be happy to listen to.

BARRETT: Thank you, very much. As I imagine most of you know, the general rule of most of the courts, until after the beginning of the present century, was that illegality of the means of obtaining evidence was no objection to its admission in a criminal prosecution. Any person, who felt that the police had acted illegally with reference to him in arresting him or in searching his premises, had a civil remedy for damages, and perhaps, if the police activity was sufficiently bad, there might have been criminal punishment involving the policeman. This was the general rule amongst the courts.

In 1914, the United States Supreme Court, in a case which involved prosecution in a federal court in a criminal case, adopted the rule for the federal courts that evidence which was obtained by unconstitutional means, where the police officers engaged in unreasonable searches with a common situation, would be excluded

and would not be admitted in criminal prosecution. The result of this was, of course, that in cases where there was a question as to legality of the evidence - take a typical narcotics case, although at that time, I suppose, a typical case soon became a liquor case - if the policeman had acted illegally in seizing a narcotic or seizing the liquor, on a proper motion the defendant could get this excluded. Normally, if he got this excluded, he went free, because it would be the substantial evidence.

Now, a number of state courts, over a period of years, adopted this rule. Prior to last April, some 18 states adopted this exclusionary rule by judicial decision. Two others had adopted it by statute or constitutional amendment, North Carolina and Texas. One state, the State of Michigan, which had originally adopted the exclusionary rule, had, in two separate amendments to its constitution, reduced its impact. The people of the State of Michigan, in the early 1930's, largely as a result, I gather, of the problem of a lot of policemen getting shot in Detroit and the difficulties of finding legal ways to get firearms on searches of people they picked up, amended the constitution to provide, in effect, that the seizure of any firearm, rifle, pistol, blackjack, machine gun, et cetera, so long as it was seized by a peace officer outside of the dwelling house of the person from whom it was seized, that this could be admitted even though it was an illegal search.

Then, in 1952, the people of Michigan, because of concern with the impact of the exclusionary rule in narcotics cases, added to this constitutional provision the notion that any narcotic drug which had been seized, as the constitutional provision puts it, outside the curtilage of any dwelling house in this state, would be

admissible regardless of the legality of the officer's action.

The exclusionary rule, I gather, though I do not know too much about this, has had a varying impact in the states, depending in large part upon how liberal the state's rules are with respect to arrests, searches and seizures. I was told just the other day, for example, that the exclusionary rule in the State of Wisconsin did not bother the police very much, because the State of Wisconsin had fairly broad rules governing police arrests and police searches and seizures, so that its impact was restricted there.

Now, the United States Supreme Court, which gets into this picture in a limited degree, has held that the states are not bound to adopt the exclusionary rule. The Court has said that while the provisions of the Constitution against unreasonable searches and seizures do apply to state officers, still, state courts are not required, as a matter of constitutional law, to exclude illegally obtained evidence. However, the United States Supreme Court, in a series of cases - and they are not very well defined yet - has said that there are certain kinds of police illegality which should result in the exclusion of the evidence. The leading case is a California case where the policeman - I think that was a Los Angeles case - where the policeman arrested a man. They thought that the man swallowed some narcotics just prior to his arrest, so they took him to the hospital and pumped out his stomach, and then they got the narcotic in the stomach pumping operation, and the Supreme Court said that this sort of violence or brutality to the person was sufficient to make a constitutional requirement of the exclusion of evidence.

More recently, in a case also coming out of California

involving dictagraph installations, the Court has said that the constitutional compulsion which forced the State, as a matter of federal law, to exclude evidence is limited to evidence which has been seized as a result of coercion, violence, or brutality to the person. That was the general tenor of the Irvine case.

Well, that is a quick sketch of the general background of the law on the exclusionary rule in the United States. Now, I thought what I would like to do, and in part this is what I did in the article that Assemblyman Smith mentioned, is to talk a little bit about the California situation as it existed prior to the Cahan case, indicate a little of what I think are the reasons why we have the Cahan case, and then, perhaps, suggest in a general way the sorts of things it seems to me that the Legislature ought to be considering.

Now, admittedly - maybe admittedly is too strong a word - but I think that you could have gotten a substantial body of opinion to say that the situation in California prior to the Cahan case was not a satisfactory situation in the point of view of the law regulating police activities. It was not satisfactory for two reasons. Basically, in the first place, the law which regulates the police, the law concerning when is an arrest lawful, the law concerning when is a search lawful, was in a very ill defined state in California. The statutes, such as they are, are very general; there have been very few judicial opinions in the State of California dealing with the question of the legality of a police arrest or a police search, so that we have a situation where the law itself, which governed the police, was very vague. Now, the vagueness of this law resulted from the fact that there was really

no very satisfactory way of bringing the question of the legality of police practice into issue. A person who felt that he had been subjected to an illegal arrest, or felt that his house had been searched illegally, had in theory a civil remedy; he could go to court and sue the officer for damages. In a very large percentage of the cases, this was no more than a theoretical remedy. Certainly, it wasn't much of a remedy for the man who was, in fact, guilty, and where the narcotics had been found in the course of the illegal search and where, when he was arrested, they found the weapon on his person, and so on, because the difficulties of convincing the jury to give him some damages were obviously difficult. Even from the point of view of the person who himself had not been guilty of any crime, that the officers had come in an unwarranted way and searched his house, or they had arrested him on the street without having adequate cause for arresting him, the civil remedy was not a very satisfactory remedy. He had to go to court, he had to hire a lawyer, and he had to bring a lawsuit. He had the duty of convincing a jury that they ought to give him some substantial damages, and then, once he had convinced the jury to give him some substantial damages, he had problems collecting it from the police officer, and as a result of these limitations, you did not get very many civil suits. A few, and I think in some areas and at some times they undoubtedly have had some impact on the police departments, but, by and large, not very many civil suits.

Well, outside of the civil suits, there was no occasion for the courts to deal with the question of the legality of police practice. In the ordinary criminal prosecution in California courts it was irrelevant how you got the evidence; therefore, the courts

never got to the point of deciding was this a legal search, was this a legal arrest? Well, this situation, as a practical matter, left police departments with a very broad discretion in the way they could handle things; in effect, I suppose it meant that for all practical purposes, the police department could decide for itself what it thought were reasonable procedures in terms of arrest and searches and seizures, and as long as these procedures did not run afoul of local community pressures in the form of newspapers or political attacks on the police department, the police didn't have to worry about the fact, "Well, if we are a little over zealous in this case, the defendant will get off."

Well, with this background, this problem came again before the Supreme Court of California in the Cahan case, and the Court was faced in this case, as it would be in any other case where they were dealing with the issue, with two alternatives, neither of which, I suppose, was wholly satisfactory from the point of view of the Court. But there are only two things the courts can do about this problem: one is to do nothing, to abide by the common law rule and say it does not matter how the evidence has been obtained, unless you run afoul of the federal constitutional guarantee, as long as you do not have violence to the person, brutality, or something of that sort - it does not matter how you got the evidence, and, therefore, taking that position, which is the position the California Court had taken up to the Cahan case, that alternative left the rules ill-defined and removed most of the judicial pressure from police departments to conform to the rule. Furthermore, it meant that there was not really any pressure to go to the Legislature. Even if the rules were inadequate, even if the police felt that

their powers of arrest were too restricted, there was no real pressure on the law enforcement officials to go to the Legislature and ask for reforms. They could get along under the existing system and, as one man who is active in the District Attorneys' Association in legislative matters, said to me once, "We feel that if we go to the Legislature and ask to have the law of arrest broadened, we might conceivably end up with having it narrowed, so we do not need to get into this picture."

Now, the other alternative that was with the Court was to say, "Well, we are going to do something about this and adopt the exclusionary rule and say we will not permit the use of evidence obtained by illegal means." Now, this is what the Court did. So, I think that even the judges of the California Supreme Court that voted this way will admit that this is not a completely satisfactory alternative, because once you do say that illegality in obtaining the evidence results in its exclusion, you inevitably allow a lot of criminals, who deserve to go to jail, to be set free because of the way in which the evidence is obtained. And so the Court went ahead and, even with recognizing this, adopted the exclusionary rule.

Now, in the original Cahan case, it was not completely clear why the court reached this result. The court pretty much said, though there have been some intimations in other judicial opinions otherwise, that the reason for the exclusionary rule was not to protect the defendant. They said that the man who has been guilty of a crime has no personal right not to be convicted because of the illegal act of the police officer. This would seem to be fairly obvious, that you do not have a constitutional right to commit a crime even though you are committing it within your own house, and

the fact that a man is making book in his house, or the fact that he has narcotics there, and the fact that it is in his house, still does not mean that he has a constitutional right to break the law. The only constitutional right he has is that the police shall act legally in getting into his house to find out what he is doing. So, the Court said, not for that reason, but the Court intimated in some broad language that maybe one of the reasons why they were doing this was that they felt that it was improper for the courts to lend their aid to the consummation of the illegal activities of the police and that it was somehow immoral for the courts to admit evidence of this character, because it meant that the courts would be condoning the activities of the police department. You get a certain moralistic tone along this line to the original Cahan opinion. I think on the whole this is a dubious ground upon which to rest, because the court, if it excludes the evidence, is, in effect, condoning the action of the criminal, because it usually means that he gets off; if they don't exclude the evidence, upon this same theory, then, they are condoning the act of the policeman, and I am not sure it is possible to say, as a general proposition, that in every case it is better that the courts should condone the act of the criminal than that they should condone the act of the police officer.

Primarily, however, the court said, we are adopting this rule for the purpose of disciplining the police. They said that the civil remedies had not been adequate; we have found no way in California to make certain that the police conform to the rules; we feel that excluding the evidence will make the police conform to the rules; that, by and large, police officers and police

departments are interested in securing convictions of the people that they arrest, and if, in making an illegal arrest or an illegal search, it will have the result of letting the man go free, the police departments will behave more carefully in the future.

In a couple of recent cases, the Court has been even more explicit about this, and they have said, for example, in one of the recent cases, "We were fully aware that in its immediate operation the exclusionary rule would permit guilty persons to escape punishment, but we are convinced that it was necessary to secure respect by law enforcement agencies of constitutional guarantees."

And, in another case decided only last month, the Court said, "The exclusionary rule did not provide a remedy for a wrong done to the defendant, but, as a means of providing a restraint upon law enforcement officials." This happened to be a case, incidentally, People against Martin, which raised the question of whether or not a defendant could object to the introduction of evidence which was seized illegally, not from his house, but from somebody else's house. It is generally thought in the federal rules that only the person whose privacy had been invaded was entitled to object. The Court, in this case, said for California, "No, we are going to say that no matter where the evidence was illegally seized, whether or not it was from this defendant's premises or not, he can object to the introduction of the evidence." The Court said, "Whenever the government is allowed - the government should not be allowed to profit by its own wrong by basing a conviction on illegally obtained evidence," and said, "If law enforcement officers were allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent

nullified." And so the California Supreme Court now is explicit in saying that the reason why it adopted the rule in the Cahan case was to put pressure on law enforcement officers to abide by the rules which govern law enforcement officials.

After deciding the Cahan case, of course, the Court took on for itself the job, now, of formulating rules, because the immediate impact of the Cahan case is to attempt to send a large number of cases to the Supreme Court to rule on the legality of a search, the legality of arrest in the particular case, and we are now getting a long series of cases in which the Supreme Court is trying to articulate, for the first time, fairly detailed rules governing police activity.

Now, I said earlier that, so far as the courts were concerned, they had an unsatisfactory choice, and neither thing that the court could do was wholly satisfactory. Not adopting the exclusionary rule meant that until such time as the Legislature saw fit to act, and there was no immediate pressure on the Legislature to act, nothing much would be done by our judicial system, certainly, to see to it that policemen obeyed the rules, and, furthermore, nothing much would be done to get the rules articulated, to even find out what the rules were.

On the other hand, the exclusionary rule itself, while it would put pressure on the police department - how much pressure, incidentally, is a very uncertain subject - nobody has really demonstrated as a factual matter whether or not the exclusionary rule has a substantial effect in disciplining police. I would guess that the experience of the past few months in California would suggest that it had some effect, at least, that police departments order

their affairs differently in a number of situations now than they did before the decision.

Now, fortunately, the Legislature has many more choices open to it in handling this matter than the courts have. And for one thing we should thank the Supreme Court of California, and that is, when they adopted the exclusionary rule they very carefully said, "This is not a matter of constitutional compulsion? They said, "The exclusionary rule is a rule of evidence that we are adopting as a mere rule of law and not as a constitutional rule." This had two impacts, I suppose. One was to prevent everybody in jail in the State of California from seeking a writ of habeas corpus to get out on the theory that he had been convicted by unconstitutional means. But the other impact it had was to leave the door open fairly wide, I think, for the State Legislature to step in and write some statutory law, and it will not have to write constitutional law, in this area.

Now, as to what the Legislature should do, I am certainly no expert. What I would like to do, though, is to suggest the sorts of things that the Legislature might do after it has examined the facts. Obviously, legislation in this field will not be adequate unless it is well informed, and I assume that is the purpose of these hearings. Certainly, in the "ivory tower" at the University I do not find out much about the actual problems of the police, how policemen actually behave, what powers of authority the police need in order to enforce the law. This information will have to come to the committee from those people who are informed on that subject. But it seemed to me that I could classify, in a way, some of the sorts of things the Legislature might consider doing. Obviously,

they will not want to do all of these. Maybe they will not want to do any of them, but these are the sorts of things which I think are open to the Legislature.

In the first place, it seems that in the way the Cahan case was decided, it is open for the Legislature to decide for itself whether or not it wants to reverse this decision by statute and to make illegally obtained evidence admissible in the courts of California. Now, there is a range of approaches that could be made to this subject. The most extreme one would be that the Legislature could pass a law saying in so many words that evidence will be admissible in criminal trials in California whether or not it was obtained by illegal and unconstitutional means. Or, the Legislature could take certain kinds of in between positions. One type would run something like this:

You could have a statute that would run along the line that where certain types of evidence - the most obvious one I suppose being narcotics - maybe you could get a list of certain types of evidence which would seem most important from the law enforcement point of view, you should not have the exclusionary rule, and abrogate it only as to narcotics cases, or some other groups of cases which you might want to classify after looking into the facts. Or the same sort of thing could be done the other way around. The Legislature could pass a law saying, in effect, that evidence which had been obtained by means of unconstitutional activities by the police shall not be admissible, or shall be admissible, except for evidence obtained in ways thought particularly indefensible. In other words, the Legislature could say the exclusionary rule shall not operate except as to evidence obtained by wire tapping, for example, or

evidence obtained by some other types of situations, which, as a matter of legislative judgment, you might think that "these are so bad that we do not want to convict anybody on this kind of evidence," but in all other situations it would be admissible.

I suppose those three types of statutes would be the kind that you might want to enact with reference to the Cahan rule itself. The details, of course, if you do more than abrogate, would have to be filled in after careful consideration of the merits of the particular situation.

Now, another thing that I think the Legislature should give attention to, particularly if the decision is made to abrogate wholly or in part the Cahan rule, would be a means of providing some substitute for putting pressure on police departments to abide by the law. Now there are a couple of possibilities here. One, of course, would be to increase, make more effective, the present civil and criminal remedies which are imposed on the officers themselves. I have some personal doubts about the wisdom of this that run along the lines that if you make it too expensive and too risky for policemen to arrest people, law enforcement is going to have to go into a decline for that reason alone. This is a reason which appealed to the Supreme Court of California in certain kinds of cases where they have felt that if you go too far in making the individual policeman liable, you will make him too hesitant to do his job.

The other possibility - and this is not original with me; I first saw it suggested in print by the Committee on Criminal Law of the State Bar of California - would be the possibility of considering enacting a statute providing for a remedy directly against

the city or the county that employed the official in any case where a person had been unlawfully arrested, unlawfully searched, and so on, that he should have a right to proceed directly against the county or directly against the city; and probably a statute which has some sort of a minimum recovery - say, a minimum recovery of \$500 without any showing of damages - sufficiently high to make it possible that the person involved could afford to hire a lawyer to bring suit. If it worked, its major virtue, I suppose, would be that any time a police department got badly out of hand and got extremely overzealous and started racking up a record of illegal searches and illegal arrests, the county, or the city would start to feel a financial burden, because you would get a lot of these suits if they were made sufficiently attractive, and the city fathers, if they had to start paying out a lot of money for suits on false arrest and imprisonment, undoubtedly would put pressure on the police department to conform more closely to the rules. This, at least, is the theory behind this kind of a statute.

Now, the other thing, the third general area in which I think that the Legislature ought to work - and this is at the same time the most difficult and the most important - is in the direction of legislative clarification of the law of arrests, of the law of searches and seizures, certain sorts of queries I have, which I think maybe the Legislature ought to look into. One, for example, is a complete reexamination of the present statutes dealing with warrants of arrest and warrants for searches and seizures. These statutes have been with us, by and large, since 1872; they have not been looked at in terms of modern conditions; our search and seizure statute has some limitations on it which make it useless

for police purposes in a lot of situations in which policemen, if they are ever going to use warrants, ought to use them. For example, the present statute governing warrants for searches and seizures does not permit police officers to get a search warrant to look for evidence. You can get a search warrant to look for the tools of the crime, but presumably, under the statutes, you cannot get a search warrant to look for a body, or to look for fingerprints on the walls, or bloodstains on the bedclothing, or anything of this sort, which is merely evidence and which cannot be classified under the term "tools of the crime" or "stolen property." There seems to be no particular policy reason why search warrants should be so limited. If you are going to catch criminals, obviously there ought to be situations in which the police can search for evidence as well as searching for the tools of the crime. And so attention certainly ought to be given to the substantive limits on search warrant procedures as to what they can be obtained for. Perhaps the warrant procedures could be somewhat simplified to make them more easily workable in modern circumstances.

I gather that prior to the decision in the Cahan case, the issuance of search warrants was practically unknown in Los Angeles County, for example, in large measure because of limitations of this kind. If we want, as a matter of public policy, and certainly the Supreme Court has indicated that it wants it, to require police officers to, in more instances, go to the judge and make a showing before they can get the chance to go out and make the arrest or the chance to go out and make the search, then we ought to make the search warrant procedures more workable than they are now.

The statutes governing arrest - situations in which policemen

can make arrests - certainly need to be reexamined. Our statutes which we have governing arrests can be traced back to the common law in England. Most of the rules we have in this area grew up at a time before we even had professional policemen, at a time when most arrests were made by private citizens, and also at a time when the consequences of an arrest were much more than they are now. Two or three hundred years ago in England, if you were arrested and you did not have bail, you might spend the rest of your life in jail without ever even having a chance to come before a court and argue that you should get free. In England a few hundred years ago, when the arrest was being made by a private citizen, you did not know whether it was an official arrest, or whether it was a highwayman that was going to steal your property or what not. Well, our limitations on arrest, our traditional limitations, grew up in this period of English history, and we have carried them along. Well, we ought to look at them and see if we can make them more workable.

The basic statutory situation in which a policeman can make and arrest in a felony case without a warrant is expressed in terms of if he has reasonable cause to believe that a felony has been committed and that this person that he is arresting has committed a felony. Well, this is obviously a very broad and nebulous kind of a rule, and what is reasonable cause may depend on who is looking at it and when they are looking at it. The viewpoint of the policeman who is down in the tough section of town and sees a suspicious character whom he thinks might be carrying a gun, he is apt to find things or think that something is reasonable. When the matter is being considered by the trial judge on a motion to exclude the

evidence, the trial judge was not down in the tough section of town and it is not going to look quite so reasonable to him. When the issue is being considered at the level of the Supreme Court of California by judges who were probably never in the tough section of town, the issue of reasonableness looks even different. So that this broad concept has difficulties when you are dealing with an exclusionary rule, if whether or not you can use the evidence depends upon whether the arrest was lawful, whether the arrest was lawful depends upon whether the policeman had reasonable cause, and then you, after the fact, look at the question by a judge, you determine whether or not the defendant should go free.

Now, there has been quite a bit done here and there on terms of drafting statutes relating to arrest. There is a Uniform Arrest Act, which was drafted by Professor Warner of Harvard in the early 1940's, which has been adopted in only a couple of states. It has some interesting ideas in it. There is an article dealing with this Uniform Arrest Act, which was written a few years ago by a student, in the California Law Review. The American Law Institute is at the present time engaged in a project of drafting a model penal code. As one part of this code, the American Law Institute draftsmen are dealing with the statutes governing arrests and statutes governing searches and seizures. In the course of their drafting, they have evolved an idea which seems to me to be worth exploring. This is that maybe you could take away some of the vagueness of this notion of reasonable cause by spelling out in the statute certain stereotyped situations which would be reasonable cause, and that if you could make this showing you establish reasonable cause. For example, the suggestion has been made that the

the statute might read that if a police officer has received information from a person that he knows to be reliable that a crime is being committed at a particular place, that this alone ought to be reasonable cause for going to make an arrest. On the other hand, it has been suggested that if a police officer receives information from an anonymous source or from somebody that he knows not to be reliable, this maybe should not be enough to allow him to make an arrest unless there are some surrounding circumstances which corroborate the tip, and that the mere tip alone, if it does not come from somebody known to be reliable, maybe should not be enough. Well, statutes conceivably could be drafted along these lines. If the people who know the practical problems could sit down and look at it, you might be able to classify such a situation.

It is also possible, I think, to have legislation attempting to spell out what are reasonable searches and seizures. Now, both here and with respect to the law of arrest, there are some constitutional limitations. What they are and how far they circumscribe the Legislature is by no means clear, but to a certain extent the constitutional provisions against unreasonable search and seizure inhibit how far you can go in permitting arrests, how far you can go in permitting searches. We have very few cases, either in this State or elsewhere in the country, which have dealt with statutes which say "this is reasonable," and then with the courts trying to say, "Was it constitutional for the Legislature to say, 'This was reasonable'" I would say that, certainly, there was an ambit for the Legislature to modify, in ways they think proper, the present law. Now, I suggest there are some outer limits. I suspect that the normal political pressures in legislative activity would mean

that it would be unlikely that the Legislature would reach the outer limits in any sort of thing. These, perhaps, become more acute when you deal directly with the questions of search and seizure, but maybe the Legislature here could spell out some situations in which it seems that, under certain circumstances, it would be reasonable to make a search.

One problem, for example, which is obviously a difficult problem of policy both from the point of view of those interested in the administration of justice and those interested in individual liberties, is this question of the use of dictagraphs. How far, if at all, should the police be allowed to secrete microphones in people's houses if they suspect a crime. Well, at the moment, the rule seems to be not at all as long as they trespass in the process. Now, perhaps here the Legislature might want to consider, if it has decided that there are cases in which dictagraphs ought to be used, putting this in the framework of getting a warrant as a prerequisite of making a particular dictagraph installation. Maybe the policy decision is that the objections we all have to this notion of people surreptitiously listening in on what we are doing in the privacy of our homes is sufficiently strong that we should say no dictagraphs, or maybe we will want to say in certain circumstances, but only after you have gotten a warrant. I think things as this sort could be handled by legislative activity.

Now, most of the regulations in this field, as I suggested, will be very difficult to draft, and I think it will be very difficult to know what you want to draft until you get quite a few of the facts. As I say, here is the area, sitting where I do, that I do not have the facts, but I assume that from law enforcement people,

from people interested from the civil liberties side of the fence, it will be possible to get a feeling of what the facts are. On the one hand, what are the necessities of police administration in terms of catching criminals, and on the other hand, the considerations of individual liberty which lie behind the constitutional provisions and which say that there is a point which has to be determined beyond which individual liberty prevails over police efficiency.

I think, Mr. Smith, in general terms, this was about what I had to say.

SMITH: Do any members of the committee have any questions of Mr. Barrett?

ALLEN: Mr. Chairman?

SMITH: Mr. Allen.

BRUCE F. ALLEN: Mr. Barrett, remember I wrote to you and asked you about drafting a proposed statute to change the rule of the Cahan case, and I would like to get these in the record. There are two proposed sections. The first one is a new section of the Code of Civil Procedure, reading as follows:

"Evidence shall not be excluded in any criminal proceeding merely because it has been obtained in an illegal manner."

Now, that of itself, I take it, would reverse the rule of the Cahan case?

BARRETT: Presumably. I see no reason why that should not be valid to have that effect if you want to do this. As I said to you, I am not sure you want to do, certainly, just that.

ALLEN: Would that section admit evidence of confessions obtained by coercion?

BARRETT: No, because there you run into constitutional

compulsions; that is, under the Federal Constitution, coerced confessions cannot be used, and using them is a violation of due process of law. So, this would not affect that which is an issue of constitutional law and cannot be changed by the Legislature.

ALLEN: But as far as the Cahan rule is concerned, there is no constitutional requirement that prevents us from passing a bill such as this to reverse it?

BARRETT: The court said quite explicitly in the Cahan decision, that they were not compelled by constitutional reasons to adopt this rule, that they did it as a matter of policy and not as a matter of constitutional law. If they stick by what they said, it would seem then that the Legislature could change this rule of policy.

ALLEN: Now, another proposed bill that you prepared at my request deals with imposing a liability on the employers of the police of the county, city, state, or whatever agency is involved. I am not going to read the whole thing, but it starts out:

"The local agency is responsible for any false arrest, false imprisonment, or illegal search or seizure committed by any of its officers or employees during the course of his service or employment . . ."

And then there is another section here concerning the place of trial and minimum amount of damages which we could insert. I would like to put those two in the record.*

Now, this second proposed bill concerning the liability of the local agency that employs a police officer would give the person whose constitutional rights are violated a statutory right of recovery against the financially responsible defendant. Even if

* Attached as Exhibit V

he could not show a monetary loss from the seizure, if we put in a minimum - a hundred dollars, or five hundred dollars, or some figure - why, then, at least, he could be assured of some monetary recovery.

BARRETT: You could do that another way than I did when I drafted that. You could provide "X" dollars plus reasonable attorney's fees.

ALLEN: That would be even better. Now, do you think the two coupled - the two together - reversing the rule of the Cahan case and adopting this liability on the local agencies, would satisfy the Supreme Court's problem of these unlawful searches and seizures?

BARRETT: Well, it is hard to say completely. Certainly, the remedy against the employing agency, if it is attractive enough, ought to provoke litigation. It ought to get cases into court whereby the judges would have a chance to say, "This is legal and this is illegal," and so that you would have a chance to have the law made. You see, the problem prior to the Cahan case was we did not have any law made in this area because there was very little occasion to litigate about these things. Hopefully, it ought to put at least as much pressure on the police departments to try to conform to the rules without the kinds of consequences of letting the defendant go in the individual case that you get from the Cahan case. I would not want to pass any judgment on whether this would satisfy what the Supreme Court was getting at. My own feeling is that this alone would not be enough, or should not be the stopping point, that as long as this matter has now been brought to a head, we should not pass up the opportunity to take a second look at our arrest and search and seizure rules. We have had them for a long

time, they were devised in the horse and buggy age before we had all of the modern machinery for both the criminal's side and the policeman's side, and I think we ought to take another look at them now as part of the package.

ALLEN: In other words, what is a reasonable method of searching premises and people and arresting them now might be different from what it was three hundred years ago.

BARRETT: That is right.

ALLEN: And as far as this civil liability is concerned, if we passed such a statute and a person is arrested by an unlawful search, let us say, of his house, and as a result he is convicted with this illegally obtained evidence of a sale of narcotics and he gets a life sentence in jail, I do not know what civil damages he would have, but at any rate, he could recover a hundred dollars, five hundred dollars, on that statute.

BARRETT: Well, I suppose that the man who goes to jail for life or anything like that is not apt to be bringing these lawsuits; but, certainly, the man who has a lesser sentence, or the person who does not happen to be guilty - one of the difficulties with the Cahan rule is that it notes the comparison - a perfectly innocent, respectable person has never engaged in any illegal activity, and a policeman comes down the street and searches everybody's house in an overzealous moment, and searches this man's house without any particular reason for doing so, under the present law, the only remedy he has is the highly speculative remedy of trying to find out who the policeman is - which is a problem I did not face up to, incidentally, in that draft I gave you - first he has to find out who he is and then he has to sue him, and maybe

even if he gets a judgment, he cannot recover it.

On the other hand, if in the course of searching all the houses down the block, the policeman does come to John Jones's house and he has been engaged in narcotics, and he finds the narcotics, John Jones is arrested, he moves to exclude the evidence, and in addition to the civil suit which the innocent man has, he also managed to get himself free from prosecution for his particular criminal activity. In this sense, the Cahan case seems to give an undeserved reward to the man who is engaged in the criminal activity. Now, of course, the only justification for that is, that it is the only way of keeping the policemen discriminate in their searches.

ALLEN: But if we did impose this civil liability on the cities, or other agencies, the person who was innocent of crime and was subjected to an unlawful search, would have a remedy which would not only give him some money, but a lot of personal satisfaction.

BARRETT: That is right. Of course, you would have to think hard about the amount. I mean, you would not want to create something perhaps similar to personal injury litigation, where lawyers are roaming around trying to find clients to sue the city. I mean, this is something you would not want to have too high. The amount problem, you would have to move up to pretty carefully.

ALLEN: Well, it is similar to that statutory liability of theaters that exclude people.

BARRETT: Which is perhaps too low. It does not include the attorney's fees, and it is only a hundred dollars.

SMITH: Mr. O'Connell?

JOHN A. O'CONNELL: Professor, I would like to ask you if you

think that the Irvine case indicates that if the states do not adopt the exclusionary rule that, at some future date, the United States Supreme Court will find that due process has been denied to a particular defendant?

BARRETT: Well, the problem of predicting whether the Supreme Court of the United States will move to the point of saying that you have to use the exclusionary rule in all cases, I do not see that in the cards at the moment. The Supreme Court of the United States may enlarge the scope of this notion that they now say if there has been physical coercion, if a man has been beaten up or his stomach has been pumped, that you have to exclude the evidence. Now, in the Irvine case, a badly split court said this rule does not apply to evidence obtained by dictagraph. Now, it is entirely possible that the next case that comes along, they might apply this rule to dictagraphs. That is a little hard to predict, but the indications are that the court is moving fairly slowly and on the whole confining its federal constitutional compulsion here to those cases where they think the police officer has been very badly out of line, and I see no indication that they are going to move in this direction in a typical case where the only problem was, did the officer have probable cause when he went down to seize the narcotics in the man's hotel room.

O'CONNELL: Well, if we made a statutory law the non-exclusionary rule, as you have suggested as a possibility, then we might still run afoul of the United States Constitution.

BARRETT: I am certain it is clear that there is nothing the Legislature can do about the exclusionary rule as it works with respect to coerced confessions or evidence obtained by violence to

the person. Now, it is possible, as I say, that the United States Supreme Court may enlarge that rule a little bit, but to the extent that they do, this would mean that what the Legislature says does not have any effect in those kinds of cases.

O'CONNELL: Even though the California Supreme Court says that the exclusionary rule is merely a rule of evidence, that is no guarantee that the Supreme Court of the United States might at some time declare that it is more than that, that it is a constitutional guarantee that every person has, to have this evidence excluded.

BARRETT: One thing you can be sure, you cannot guarantee the Supreme Court. As I say, so far the Supreme Court seems to be confining the constitutional exclusionary rule to these more egregious cases of the coerced confession, the violence to the person. Even though you might disagree on the fact of the stomach pump incident, the general notion here now seems to be physical coercion, physical brutality, and that sort of thing. Now, I think maybe this ambit may be enlarged, maybe it will be restricted. I think it really depends on what happens to the personnel of the court in the next year or two when there are bound to be some changes. They are pretty closely divided now.

SMITH: Any other committee members have any questions?

Mr. McGee?

PATRICK D. MCGEE: Mr. Barrett, when the California Supreme Court said that they were not compelled by the constitution to adopt this rule of exclusion, did they mean the Federal Constitution or the State Constitution?

BARRETT: Both, apparently.

McGEE: Then, I would ask you this: is there any basic difference between either the meaning or the interpretation of the two federal constitutional provisions, or are they . . .

BARRETT: You mean the federal and state?

McGEE: Federal and state. Are they identical both in their application in the Cahan case?

BARRETT: Well, this is a little complicated question to answer. In terminology, they are identical. Now, in the Cahan case the Supreme Court said, "This is not a matter of constitutional compulsion we are dealing with here."

McGEE: Did they specifically, when they made that statement, refer to either of the constitutions, or did they say both? I read it but I have forgotten.

BARRETT: They said, in so many words, that whatever rule is adopted will be a "judicially declared rule of evidence" is the terminology they used. Now, the reason I said there is a peculiar problem here is, the court went on to say that since this was not a constitutional rule, they could make their own - they were not bound by the federal decisions on when you are going to exclude evidence and when you are not, and that they could make their own rules - and they have done it in some cases - different from the rules in the federal court. So, it is possible that you have the constitutional meaning of what is an illegal search, but that same illegal search might not call into effect the exclusionary rule in California, it is even conceivable that something that is not a violation of the constitutional provision might call forth the exclusionary rule. You can't tell; it is a little ambiguous.

The court, after saying in the Cahan case, incidentally,

that it was not necessarily bound by the federal precedent, has, with one possible exception in its subsequent cases, followed very closely the federal cases. That is where they have gone for their authorities because there were so few cases in California.

McGEE: Our courts today, our state lower courts, are now bound by the California precedent.

BARRETT: That is right. They are bound by what the Supreme Court says, in theory.

McGEE: What is the illegality that we commonly refer to in illegally obtained evidence? Take wire tapping, for instance. What is illegal about wire tapping . . .

BARRETT: Well, I suppose . . .

McGEE: Unless it is specifically made a crime to wire tap?

BARRETT: Well, wire tapping is specifically made a crime in California in Penal Code Section 640, I think, or something like that. Now, as to whether wire tapping, absent statute, would be a violation of the search and seizure provision is not completely clear. The Supreme Court of the United States in some early cases held that wire tapping was not an illegal search and seizure, that the constitutional provision did not encompass listening in as long as you did not have physical trespass of the premises. These were some early cases in which they had sentences. Then the Federal Congress came along and passed a statute dealing with the subject of wire tapping, and in construing that statute, the court has held not only is wire tapping illegal but evidence obtained by wire tapping will be excluded in the federal courts.

Now, in the Irvine case, which dealt with dictagraphs, but where the problem is basically the same, it is a question of whether

overhearing - whether you overhear with a dictagraph or overhear through the wire tapping - is a search and seizure. The Supreme Court of the United States seemed to intimate there that it was, but in the Irvine case, you had, in addition to the dictagraph, the the physical invasion of the man's premises. You had a trespass, and maybe the trespass was the illegal search and not the listening. You cannot tell, and you cannot tell in the Cahan case, although I get the impression in the Cahan case that the court may have thought - and you get more of this as you read some of the other cases - that it was the overhearing by this kind of a device rather than the trespass that was at issue. This would come to a head, I suppose - it naturally will not come to a head in wire tap cases in California, because that is made illegal by statute - but if you had a detectaphone case where the officer rents a hotel room next door and puts a detectaphone on the wall and listens, he has not physically trespassed. Now, is this an illegal search and seizure to do this? There is one Supreme Court of the United States opinion, not a recent one, which says not. Now, what the California court would do, I do not know.

McGEE: Is trespass illegal?

BARRETT: Oh, trespass was made a crime. You get a civil suit, but that is not the constitutional notion here of the provision against illegal searches and seizures . . .

McGEE: Now, wait. The Constitution guarantees against unreasonable searches and seizures, not illegal searches and seizures.

BARRETT: That is right, unreasonable. What is unreasonable, I suppose, is trespassing on a person's home and privacy without reasonable cause for doing so.

McGEE: But it is the unreasonableness of the trespass that makes the evidence inadmissible, rather than the illegality of the trespass, if I am correct.

BARRETT: It is not clear as to whether a mere technical trespass alone gets you involved in an illegal search and seizure. Suppose, for example, the officer walks up on the front lawn to get a better view through the window of the house when he sees illegal activity going on, then he goes in and makes an arrest and seizes the narcotics. Now, does the fact that he was walking up on the lawn, which may have been a technical trespass, call for excluding the evidence? I do not know. But certainly, to get within the ambit of the search and seizure provision, you have to have one of those things, a physical invasion of the person or the premises.

McGEE: You recommended that we might attempt legislatively to define what is reasonable. Might we not attempt to define what is unreasonable rather than attempt to define . . .

BARRETT: It could be done either way.

McGEE: Either way.

BARRETT: As I suggested in respect to the Cahan rule, again, you might not want to abolish it completely. You might want to abolish it except in certain kinds of cases, or you might want to retain it except in certain kinds. you can do it either way. Incidentally, from the point of view of the policeman who has to operate these rules, it is perhaps a little handier to tell him when he can do, if it is possible.

McGEE: Finally, most of these rules go out the window when we get into civil litigation, do they not?

BARRETT: I assume so.

McGEE: Could we profitably look for a possible solution in the rules of evidence in civil litigation that might help us in criminal cases?

BARRETT: Well, I do not know quite what analogies you would find, because it is only here that you are dealing with a competing problem of the necessities, on the one hand, of law enforcement, and the necessity of adequate law enforcement is something that is normally the policeman's problem, but it is yours and mine and everybody else's. We are interested in seeing that our premises are not invaded by criminals. On the other hand, there is this problem of official lawlessness. We don't want our premises unnecessarily invaded by policemen. Well, then, certainly, in competing values, you have to give the policemen search powers to come in, in order to keep the criminal out. Now, the problem is where you draw this line. You do not get this in civil litigation, by and large.

McGEE: That is all, Mr. Chairman.

SMITH: One question, Mr. Barrett. In the letter which I read from Judge Hunt, he states that the court has spoken and the matter is settled unless the voters, at some time in the future, see fit to change the rule by amending our State Constitution. In other words, I interpret from his letter that he feels that it would take a constitutional amendment to negate the exclusionary rule in view of the Supreme Court's case. How do you feel about that?

BARRETT: Well, as I said earlier, I do not think so; that the Court was very explicit, I thought, in the Cahan case on this subject, in saying that this is not constitutional compulsion. Going back to the United States Supreme Court case where the United

States Supreme Court had said that it is a violation of due process for state officials to engage in illegal searches and seizures, but this does not mean that the states have to adopt the exclusionary rule. In this case, Mr. Justice Black, who represents pretty strongly the civil liberties side of the Court, took expressly the position that he thought that the exclusionary rule was a judicially created rule and was not a constitutional rule, and now in the Cahan case, itself, the Court said we are not under constitutional compulsion. This is a matter of policy and we are creating a rule of evidence. Well, maybe the Court was thinking about habeas corpus and not about legislative amendment when they said that, but, taking the Court at its word, it would seem that legislative amendment would be adequate. Certainly, even if you decided that - and I do not see any reason why you should not - you could not abrogate the Cahan rule by legislation, still there is a certain room for legislative activity in the field of defining the rules in any event.

SMITH: Mr. Barrett, this committee wants you to know that we appreciate your coming down here and giving your time. I think you are most learned on the subject.

Did you have another question, Mr. McGee?

McGEE: If you have a few minutes for one final question. Could a state constitutional provision be in violation of the Federal Constitution?

BARRETT: Well, if it purported to authorize something that the Federal Constitution forbade, yes.

McGEE: And could it be held unconstitutional by the Federal Supreme Court?

BARRETT: That is right. If the State Constitution said that

police officers can do something and the United States Supreme Court decided this violated the Federal Constitution, that would control it.

SMITH: Thanks again, Mr. Barrett.

Mr. Roger Arnebergh?

Mr. Arnebergh is City Attorney of the City of Los Angeles.

ROGER ARNEBERGH: In my capacity as City Attorney, I have a great personal and professional interest in the subject of your investigation. As a citizen, I am interested because the security of citizens is involved. As a lawyer, I am interested because the administration of justice is involved. As the public official who is charged with the prosecution of all misdemeanors committed within the City, and who has the responsibility of being the legal adviser to the Los Angeles Police Department, I have a very special interest and the advantage of a greater opportunity for knowledge of all the aspects of the problem here presented than do most citizens and most lawyers. In making this statement to you today, I have carefully weighed the problem from all these points of view, and I submit this to you for your consideration.

You gentlemen are familiar with the nature and operation of the so-called "exclusionary rule" of evidence. I am sure that you have read or heard comments which praise it as being the bulwark of society against a police state. In the mouths of some of its advocates it has already achieved equal standing with the rule that does not permit an extorted confession to be used; with the right to counsel, the right to a speedy and public trial, and the privilege against self-incrimination. But never yet have I heard one of these advocates carry their enthusiasm one step further and

and admit the effect of the exclusionary rule as compared to the effect of these other principles.

These precious legal principles of our heritage, history shows, have their roots in the desire of our ancestors to insure that the TRUTH will be known. Confessions obtained by force or undue duress were barred because there was no certainty that a confession made under such conditions was true. Prisoners subjected to either physical torture or "brain washing" can readily be induced to confess to crimes which they did not commit. Likewise, the right to counsel, the privilege against self-incrimination, even the rule that a wife cannot testify against her husband, have historical roots in the efforts by men for means of guaranteeing that the TRUTH will be known.

But now comes the exclusionary rule -- and this is the fact which I said advocates of the rule refuse to recognize -- for the first time in our history we have a rule of evidence which is designed to SUPPRESS THE TRUTH instead of reveal it. And when I speak of the truth which is suppressed, I mean physical evidence, the documents, the tools, the weapons, the narcotics, the counterfeit money, the evidence that, whether it proves guilt or innocence, can be felt, measured, tested. It is the best evidence, the most reliable evidence, many times indispensable evidence the absence of which means that the known criminal must be set free, and yet such evidence is excluded, thereby suppressing the truth.

It is indeed a strange paradox that the so-called exclusionary rule, creating an entirely new policy for California courts in the administration of criminal law, should have its inception in the courts. Traditionally, and under our constitutional form of

government with its separation of powers, it would appear to be more properly within the province of the Legislature to determine whether or not such policy should be adopted in California. Yet here we have the basic constitutional provision providing for a separation of powers infringed upon by the courts in their effort to prevent by this very indirect method alleged infringement upon other constitutional provisions.

To exempt known criminals from punishment as a means of keeping police from being overzealous in their efforts to prevent crime and apprehend criminals is indeed a strange procedure and one fraught with grave dangers for society. It certainly is a policy which should have had the benefit of legislative debate and consideration before becoming the law of this state. It is my considered opinion that had the exclusionary rule been subjected to the scrutiny of the legislative procedure it would never have been adopted as the law in California. It would also strongly appear that unless the Legislature is willing to abdicate its legislative functions it will repeal, or at the very least modify the exclusionary rule as adopted by the courts. For if your study convinces the Legislature that the intangible and illusory "benefits" of the exclusionary rule are outweighed by the very tangible and clearly visible detriment suffered by society as a result of such rule, it is in the power of the Legislature to change the law! It is not the policeman who suffers if a criminal is released, it is society.

While I am not now prepared to make specific recommendations for changes in the law at this time, I am a member of the Attorney General's Committee to study a revision of the law of arrest and

the law of search and seizure in this state where these matters are receiving careful consideration. When the work of our committee is completed, we hope to give you a draft of legislation that will be a substantial improvement over existing law, both by preserving the rights of individuals and by furthering the ability of 20th century society to protect itself from 20th century crime.

Now, I have said that I had no specific recommendations to bring you until the Attorney General's Committee has completed its work. I can tell you, however, that as far as I personally am concerned, I intend to urge most strenuously that the committee, at the very least, recommend modification of the exclusionary rule to the extent that it has been modified in Michigan - that is, in the fields of narcotics and dangerous weapons.

It was proved in Michigan, in these fields the benefits to society resulting from such an amendment so vastly outweigh the purely speculative benefits of the exclusionary rule that, in my opinion, it is dangerous to do anything less. Narcotics and dangerous weapons violations are bad enough in themselves, but the greatest danger to society lies in the fact that narcotics and weapons are breeders of crime. While we cannot, and do not, condone in principle the violation of constitutional rights by police officers, I see no reason why society should have turned loose upon it a known criminal carrying a gun, or a dope peddler caught with heroin on his person, merely because some court subsequently holds that the officer, exercising his best split-second judgment in the emergency with which he was confronted, acted differently than the court, in the quiet of its judicial chambers and after deliberating upon the matter for weeks or even months, decided the officer should

have acted. And, remember, an officer must act immediately in many cases, for example, when apprehending a dope peddler. After all, evidence of dope peddling can be destroyed as quickly as a toilet can be flushed - and in many cases it has been destroyed in that manner.

Narcotics and illegal carrying of weapons are the fields in which police work can be most effective in crime prevention. And though crime prevention is not spectacular and seldom makes headlines, it is my belief that long-range reduction in the crime rate will be due more to crime prevention than crime detection. It is more important to prevent the commission of a crime than to punish the perpetrator of the crime. All will agree that it is far better to prevent ten murders than it is to catch, convict and execute ten murderers. Yet our present laws, as now interpreted by the courts, greatly handicap the work of our police officers in their efforts to prevent crime, as well as hindering their efforts to apprehend criminals.

Narcotics, of course, are the most spectacular problem, and the most fruitful field for crime prevention. It has been reliably estimated that narcotics are involved in approximately 50% of all crimes that are committed. The crimes are committed under the influence of narcotics, or are committed in order to get money to buy narcotics. Every user is a potential pusher. Most users, sooner or later, resort to criminal activities in order to support their habits, and the worse their addiction, the more desperate their activities become. Their crimes run from petty theft to murder, with prostitution, particularly among girls and young women, being among the most prevalent and the most tragic. We find that

narcotic pushers and users are frequently among our most cunning and most vicious cases because their unsatisfied cravings make them desperate.

Anything that can be done to control the narcotic traffic is crime prevention of the most effective kind. The prevention of one person from becoming a user is literally the prevention of hundreds of potential crimes. In fact, to prevent narcotics from reaching users can literally save lives. Only last month the newspapers carried the story of a man found dead in San Diego from an overdose of narcotics. Ironically, he would probably be alive today had it not been for the fact that in the month of May he was freed from a narcotics charge on the ground that the evidence against him had been illegally obtained. Did he - or society - benefit from the application of the "exclusionary rule" in this case?

The loss to society in money and tangible property attributable to the narcotics trade is staggering enough; but the loss in human misery, degradation and disease is incalculable. In this field, and in the field of dangerous weapons, it can be demonstrated most graphically how dangerous it is to compromise with, to suppress, to exclude the TRUTH!

In considering the advisability of eliminating the so-called exclusionary rule, it should be emphasized that what is and what is not a reasonable search or seizure is not an absolute. It is not simply a matter of a police officer's doing that which he knows to be wrong that results in the application of the exclusionary rule. The courts themselves have no uniformity of opinion as to what is and what is not an illegal search or seizure. In fact, there is an astonishing fluctuation and division in court decisions.

For example, reference to search and seizure cases of the United States Supreme Court reveals a striking situation. For example:

In <u>Olmstead v. U. S.</u> (1928)	There is a 5 to 4, each dissenter announcing his reasons in 4 separate dissents as to whether or not the search was legal, proper, reasonable.
In <u>Goldstein v. U. S.</u> (1942)	5 to 3, one of the justices not participating.
<u>Goldman v. U. S.</u> (1942)	5 to 3 decision, one judge not participating; the dissenters announcing their reasons in two separate opinions.
In <u>Wolf v. Colorado</u> (1949)	There was a 6 to 3 decision, and that, mind you, is by the U. S. Supreme Court: 6 voting it is reasonable; 3 voting it is unreasonable.
<u>Brinegar v. U. S.</u> (1949)	6 to 3 decision.
<u>Stefannelli v. Minard</u> (1951)	7 to 2 decision.
<u>On Lee v. U. S.</u> (1952)	5 to 4 decision.
<u>Irvine v. California</u> (1954)	5 to 4 decision, and incidentally, in that case it should be recognized that the conviction was sustained, so that obviously it was held that the evidence, although obtained illegally, did not present constitutional points.

Consider the Trupiano case. A federal agent, present with the consent of the property owner, noticed the odor of fermenting mash coming from a building. On moving closer he saw an illicit still in operation. He entered, placed the defendant under arrest and seized the still. In a 5 to 4 decision the court held that the evidence obtained should have been suppressed because there was no search warrant.

The enduring certainty of the law there announced guided our law enforcement officials for the lengthy period of some twenty

months when the court in the Rabinowitz case, by a 5 to 3 decision, expressly overruled the Trupiano case.

When the highest court in the land tells the law enforcement officer now it is 5 to 4 this way and now it is 5 to 4 that way, is there any wonder that the policeman is perplexed? Should he be unwise enough to make a decision that a particular seizure would be illegal, whereas only 4 of the 9 Supreme Court Justices would have later concurred with him, he has failed to perform his statutory and sworn duty of apprehending criminals and preventing crime. He may thereby be subjected to both criminal prosecution and disciplinary action for failure to do his duty.

But on the other hand, if he should decide to make a seizure, and only 4 of the Justices should later agree that it was a reasonable seizure, and the other 5 should hold it unreasonable, then the officer is viciously attacked, maligned and castigated, and likewise may be subject to both criminal prosecution and disciplinary action. All this because he missed by one the number of Supreme Court Justices who would agree with his spur-of-the-moment judgment.

But add to this confusion the exclusionary rule and we have confusion worse confounded. For now the public is vitally affected.

Suppose the officer makes a search or seizure which is later held to be unreasonable - why the officer whose judgment is so bad that only 4 of the nine members of the Supreme Court agree with him, has by his unreasonable search forever granted to the criminal immunity from prosecution for his crime.

Of course, if the officer is one of our smarter officers whose judgment will be backed by 5 of the 9 Justices, then

everything is all right.

But when the Supreme Court reverses itself, and a majority view of yesterday, holding a search reasonable when made, becomes the minority view before the case reaches the court, it is a little difficult for even our smartest officers.

To me it seems preposterous that our administration of criminal justice is so uncertain and confused, and that a criminal may be turned loose, forever freed from prosecution for his crime, because a police officer in good faith made a search or seizure held to be reasonable by 4 Justices of the Supreme Court, whereas 5 held it to be unreasonable.

That, of course, is our basic objection to the exclusionary rule.

The issue is not whether police should violate constitutional rights, but rather what will be the effect if an action taken by them should afterwards be held to be illegal. Shall society be punished, the truth suppressed, and criminals freed, because of the error of a policeman?

Certainly the officer should be held accountable if he willfully violates constitutional rights. But do not free the criminal!

If there were more time, I could enlarge upon some of the problems that have been brought to our office by reason of the exclusionary rule. The answers to those problems, I trust, will be found in the report of the Attorney General's Committee, and I believe it would be more profitable to present these matters to you at that time.

Meanwhile, I thank you for the opportunity of appearing

before you, and I offer you the cooperation of my office in your work.

In concluding, I would like to present as an exhibit for your consideration a copy of the brief which our office filed in the Supreme Court of California in the co-called Cahan case. It should be emphasized in that connection that that was just another criminal case until the Supreme Court, out of a clear sky, announced the exclusionary rule. We were not involved in the case until the Supreme Court made its decision. Then we, and many other law enforcement officials, filed a petition for a rehearing, in which we set forth the true facts of the Cahan case, because the Supreme Court never had before it the true facts in the Cahan because it was not at issue in the trial court. Now, I would like to offer this as evidence, if I may.

SMITH: Thank you very much, Roger. Now, in your remarks, is it possible for us to have those to help the girl in transcription?

ARNEBERGH: Yes, I have plenty copies of those.

SMITH: All we need is one unless you have enough for the committee, we will all have one.

ARNEBERGH: Yes, I made some for the committee, if you wish.

SMITH: That will be fine. And the other document, your brief in the Cahan case, will be placed in as an exhibit.*

ARNEBERGH: If I may, I would like to offer one other document, in evidence. You mentioned that Judge Mosk had filed a copy of the talk that he made a Town Hall.

SMITH: Yes.

ARNEBERGH: And it so happened that I made a reply talk to

* Criminal Nos. 5670 and 5664, In the Supreme Court of the State of California

offer to him and I happen to have a copy of that with me and I would like to file that, if I might.

SMITH: O.K., that will be received as "Speech by Roger Arnebergh in reply to Speech of Judge Mosk," which is already in evidence. This will be the next one in order.*

Now, are there any questions?

McGEE: Yes, I have one.

SMITH: Assemblyman McGee.

McGEE: On your petition for rehearing in the Supreme Court, what was the vote recorded? Do you know?

ARNEBERGH: I believe the vote was the same as on the original. I do not know.

McGEE: Roger, I am impressed by your analogy of truth as it relates to evidence obtained, such as a confession by brutality and the suppression of it as truth. Can you make that same argument applicable to evidence obtained where there is no brutality, or force used, but in the field of the illegal search and seizure?

RENEBERGH: That is what I am talking about. In the so-called illegal search and seizure, or where an unreasonable search is made, assuming, for example, that a policeman sees a couple of young men or boys walking in a warehouse district in San Diego late at night, and he stops them and finds that one of them has a bottle of liquor, which is illegal, and searches the other one and finds that the other one has dope on his person, there you have a situation where there was what the courts held to be an unreasonable search.

McGEE: Yes, but my point is that were the . . .

ARNEBERGH: The truth is suppressed.

* Attached as Exhibit VI

McGEE: Yes, but where the confession is obtained by force, it is eliminated because it is untrustworthy, it is not truthful.

ARNEBERGH: That is correct.

McGEE: But where the evidence is obtained as a result of illegal search it is trustworthy evidence, it is good evidence, it is the truth.

ARNEBERGH: That is right, and that is the point I am trying to make, that the evidence that you exclude by a forced confession is not necessarily good evidence or not necessarily the truth, but this other case, the so-called illegal search and seizure evidence affected by the exclusionary rule, that is unquestionably - that is the truth, that is the physical evidence, and yet it is suppressed. It is the only type of case, or rule of evidence, that I know of by which you specifically exclude the truth.

McGEE: So that the arguments for its admissibility are different in the case of the illegal search and seizure as against the forcefully obtained confession.

ARNEBERGH: That is right. The only possible basis upon which a person could support the exclusionary rule is that it keeps the police department in line. There is no basis that it protects the defendant from being wrongfully convicted of a crime, I mean convicted of a crime that he did not commit.

McGEE: That is all, Mr. Chairman.

SMITH: Any other questions?

ALLEN: Mr. Chairman?

SMITH: Mr. Allen?

ALLEN: Mr. Arnebergh, I take it you do not favor encouraging the police to use unconstitutional means in prosecuting cases.

ARNEBERGH: No, we certainly do not. As a matter of fact, our office, as legal adviser to the Police Department, has always advised the Police Department that they must scrupulously obey the law in every respect, and Chief Parker has issued orders requiring that the Police Department, at all times, obey the law. But the question comes up not so - these flagrant cases, if there are any flagrant cases, certainly, the officer should be punished, and in one instance I know of, an officer was removed from the Police Department.

But the question really coming up here is where it is a highly technical matter as to whether or not the search was reasonable. As I mentioned, the United States Supreme Court, after deliberating upon the matter for months and having the benefit of long argument by counsel on both sides, decides five to four. Four of the members of the Supreme Court of the United States thought it was reasonable, and yet, the same thing will be in our California courts. You get a division there, maybe four to three there, four holding it unreasonable, three holding it to be reasonable, but because only three of the members of the Supreme Court held it to be reasonable and four held it to be unreasonable, the officer, who, in good faith, made the search or seizure, is guilty of a wrongful act, and the criminal, more important, is turned loose to again prey upon society.

ALLEN: How do you feel about having the city, for example, accept the civil liability as one way of getting around this problem?

ARNEBERGH: Well, let me say this, that first of all - of course, the city, that is merely the citizens, and it would have

to provide the appropriations to pay the judgments - but the thing is simply this, that we now have a right - the individual now has a remedy to sue for a wrongful act, and in the cases where the case has gone to the courts and to the juries and the full facts have been disclosed and weighed by a jury, we have lost very, very few cases, although we have a great many of them pending against the Police Department, not because there is any merit to them, but because it was done as a method of intimidating the Police Department.

ALLEN: Those are suits against the individual police officers?

ARNEBERGH: Yes, sir.

ALLEN: But not against the city?

ARNEBERGH: No, not against the city. The only distinction would be that there you would have, as has been mentioned, assault on a person, but a police officer himself is generally assaulted, at least to the extent that any judgment would be given.

ALLEN: Well, then, you feel that if we did impose this statutory liability on the cities to make them stand behind the actions of the individual police officers, the extent of the liability on the cities would not be very great in view of your experience?

ARNEBERGH: I do not think the experience would be that there would be any great liability. I would be strongly opposed to the suggestion that might have been made that you add to that reasonable attorney's fees, because our experience has been there are quite a few attorneys who will go out and drum up suits just to get reasonable attorney's fees.

ALLEN: Do you favor revising the laws of arrest and search?

ARNEBERGH: Yes, very definitely. We are working on a committee to do that now; we have done a lot of study on it. Two of the men in my office, Mr. Dougherty and Mr. Campbell, have spent considerable time on it, and we expect that long before the next Session of the Legislature - the next Regular Session - we will have available for presentation a complete revision of the law of arrest for California for submission.

ALLEN: Thank you.

SMITH: Do any committee members have any other questions?

(No questions)

Now, we have one other witness, and it will be in the nature of a film. We will take an hour for lunch after the next witness, the film, and then we will resume at that time. It probably will be close to 1:30 or 1:45.

Judge Hewicker, we will get you on right after lunch.

Now, Mr. Hederman, do you want to go back tonight, or are you going to stay down?

HEDERMAN: I can be here.

SMITH: Well, then, we will try and get you on this afternoon.

Tom, you want to go back tonight, don't you?

LYNCH: Yes, I have a 5:30 appointment.

SMITH: All right, as soon as we come back, why, you and Judge Hewicker can come on.

Now, there has been a film prepared by Mr. Jack Webb, whom you all know and have seen on the Dragnet series of Mark VII Productions, called "The Big Push." It will not be released, I understand, until January 19th, but upon request he has very kindly consented to allow us to see this film here today.

Mr. Jack Webb is in the audience. Jack, would you come up and be our next witness, with your film, if you would, please?

(Movie is shown)

1:30 P.M.

SMITH: The committee will come to order.

Mr. Tom Lynch, District Attorney of the City and County of San Francisco, would you like to start the afternoon? Tom, may I say we appreciate your coming all the way from San Francisco down here to be with us. Go right ahead.

THOMAS C. LYNCH: Well, first of all, gentlemen, I do not want to add to what has already been said. I attended the morning session and I think Mr. Barrett and Mr. Arnebergh made a pretty complete survey of the Cahan case and its implications. I would like to offer a few suggestions. I think in the spirit of the session which is being held, which, as I understand, is to determine whether or not there should be some activity in the Special Session of the Legislature which will be coming up during this year.

I must say, parenthetically, that I speak only for myself, as the District Attorney, although I am a member of the Law and Legislative Committee of the District Attorneys Association and also the northern California chairman of one of Attorney General Brown's committees to do some research on this. Unfortunately, I was handed the problem of search warrants, and I have been unable to find any definitive law in the State of California on the subject of search warrants, and I am completely displeased with the law as it stands, because it is, as far as practical police work,

useless to us. That has already been pointed out by Professor Barrett. Its main field of uselessness lies in the fact that we are unable to use a search warrant for, you might say, the popular conception of what it was intended for, that is, to secure evidence of a crime having been committed. It does not, except in limited cases, cover that subject.

Now, I would like to point out something else in line with the Cahan case, and I think I make this as a direct appeal to this committee and I say it because the court itself says it, that in my opinion, and it is my personal opinion, the Cahan case is an intrusion upon the province of the Legislature. I have no quarrel with the rules of evidence as they might be laid down, but I agree with the Supreme Court of the State of California that that is a function of the Legislature, as they have so often said. They said it parenthetically or as dicta in the Irvine case and the Rochin case; the United States Supreme Court has said it, and if you will look at the Cahan case in the advance sheet, you will find that the opinion just preceding it has a question submitted to the court, and they said that it was not their function to make law, that was the function of the Legislature. I do not believe that it is a matter to be determined by the composition of a court, as has been pointed out by Mr. Arnebergh, which may be four to three today, and is possibly four to three in the other way tomorrow, depending upon the composition of the Supreme Court. The very same justices, and I say this not critically but as a matter of record, who passed upon the Cahan case have had similar problems presented to them, and Mr. Justice Carter has always maintained his position that he was in favor of the exclusionary

rule but has added that that was a matter to be determined by the Legislature. I think it is more basic than that. The function of the Legislature is to interpret the will of the people and to pass such laws as they feel are necessary for the control of the criminal element within a community.

Now, I would like to point out some examples of the things that are happening. Here has been our experience. I believe, number one, the Cahan case has had a very deleterious experience upon police departments. I think we have been very fortunate that it has not been manifested more gravely than it has up to this moment. I would like to point out to you - I do not have the exact figures at my command, but you will find them in the Journal of Criminal Law and Criminology which is put out by Northwestern University - that a survey was made of the experience of the so-called "Racket Court" in Cooke County, Illinois. Rackets are loosely defined there as bookmaking, gambling, narcotics and gun law cases. Out of some round number of 6,000 cases that were presented to that court, over 5,000 were thrown out, and that included many narcotics cases. It also included, and I think this is a rather shocking thing, cases of carrying concealed weapons. I have been trying to reconcile the Cahan case with the arrest of a man who is carrying a concealed weapon. As a violation of the law, if he is an ex convict, it is a felony; if it is an alien, it is a felony. We know that our Constitution says that we have the right to bear arms, but we also know that the Supreme Court has held many times that the right to bear arms can be bound about by certain reasonable restrictions, and one of them, upon which we all agree, except perhaps in the State of Texas, is that you cannot carry it concealed

upon your person unless you have a permit authorizing you to do that. We do not quarrel with that. People are going about our streets with guns in their pockets. I fail to see what constitutional right a man has to carry a gun concealed upon his person and why we have to give that gun back to him.

Now, you may say, well, that is a rather minor thing, but it brings up something much more important. I would suggest to this legislative committee that it recommend to the Legislature that there be a special call to consider the effect of the Cahan case. I am not prepared to say at this time that I want the amendment suggested by Professor Barrett to merely, by a short three or four lines, say, "We hereby abolish the rule in the Cahan case." I would rather leave that to my colleagues in the District Attorneys Association and to the peace officers and sheriffs who will be able to present a very comprehensive report.

However, I would like to point out some of the fields and where it is terribly important. One is in the laws of arrest. We are hopelessly at sea now as to what really are our laws of arrest. Professor Barrett has gone into it and has told you that they are founded in antiquity, have not been changed or modernized. I was fortunate enough to catch the tail end of the letter from Judge Sapiro in which he commented on the fact that it is about time we caught up with the times and realize that we are living in a modern and electronic age.

The greatest danger a police officer faces is that he may be shot or stabbed or otherwise set upon when he is questioning a person or goes to arrest him. Police officers are trained in their business; they know characters, they know people who might

be, possibly, about to commit a crime; and certainly, the least they should be able to do is to protect themselves by a search of a person when they go to question him, to see whether or not that party has a gun or some other weapon. You will find, I think, in some of the suggested model codes of arrest, that that is one of the things that everyone is concerned with.

We do not have to see misfortune in an officer being killed because somebody pulled a gun on him to realize that that is an important part of our arrest procedure, the safety of the officer. There is nothing unreasonable about it. You have seen Jack Webb's picture here, and you see how quickly an officer can determine whether or not you have a gun upon you. He is not going to inconvenience you in any great way, and if you have a weapon, you should come up and explain it.

The laws of arrest, in my opinion, need complete revision. An officer has no criterion today of what is reasonable cause. Well, what is reasonable cause? The Supreme Court has not told us; the law books can't tell you; their manuals and instructors cannot tell you. There must be some definition of "reasonableness." What is reasonable in a given instance, or perhaps, as one of the legislators has suggested, what is unreasonable, but at least, some definitions of terms. Now, the same is true of many types of police activities. The search warrant procedure, in my opinion, should be immediately surveyed and should be studied so that search warrants, if they are to be used as an implement in criminal detection, should at least be broadened to the point where they can be used for what I think should be their primary purpose, and that is to obtain evidence if you have reason to believe that

can be secured.

Now, number two on that subject, I defy anyone to give a clear definition of what are the grounds upon which you may secure a search warrant. Basically, if I understand the law correctly, you may get a search warrant if a person will come in and swear to an affidavit that at a given place there is certain contraband or the means of committing a crime. Well, that may look all right as it is written, but the type of information we get in our business, as you just saw demonstrated here in this Dragnet film, usually comes from informants. It comes from other agencies. It comes primarily, and I would say in 90% of the cases, from people who are willing to cooperate with the law enforcement authorities and give them the information, but they do not wish to have their identity revealed. Now, if we are going to trust our police departments to protect us, we have to trust them a little bit to the extent that we believe that in the ordinary case they are going to act reasonably. We do not ask you to leave that discretion to them. We ask you merely to broaden the base of a search warrant so that when they go before a magistrate, if they have sufficient to convince him that they are acting reasonably, then he may issue the warrant.

Now, let's explore that for a minute - some of the things that have happened since the Cahan case. The primary thing that has happened is that you have had a falling off of arrests in gambling cases and narcotic cases. I cannot emphasize any more strongly than Mr. Arnebergh did the importance of the apprehension of people who are dealing in narcotics. It is not the type of a business where you can run out and secure a search warrant; it is

not the type of business that is done by placing adds in the paper. It is a dirty, rotten business, and it is done clandestinely and by people who are naturally sneaks by nature. They are the lowest form of humanity and you almost have to descend to their level. We cannot go out and use electronic equipment, or use something where at least your hands are clean. We have to go out and practically pose as dope addicts and peddlers in order to make contacts with these people. I ask you, which is more reasonable, going out and using scientific methods to apprehend a criminal, or posing as a criminal yourself, which is what we do. Narcotics work today, to be successful, can practically be accomplished in only one way and that is by the use of undercover men who are posing as narcotic addicts and narcotic peddlers. It is a low business; we do not like it, but we have to do it.

A number of cases have come to my attention, and I would like to tell you one or two of them just to give you an example of what is happening. There is another field where I would suggest proposed legislation. In order to protect ourselves against the effect of the Cahan case, where we believe that we are right, we must have amplified the rules on appeal. I will give you a concrete example. In San Francisco awhile back, we were called on an assault case. The officers arrived and they made an arrest for the assault. It was a perfectly valid arrest. There is no question about it at all. That is conceded by all parties. As is usually done, a preliminary frisk was made of the defendant at the scene to see whether or not he was carrying a weapon. He was not; the weapon was on the floor in some other place. He was taken to the police station and was booked. At the time of his

booking, naturally, he was thoroughly searched, and in his possession he had a paper bag with marijuana in it. He also had the misfortune to have two prior convictions for marijuana - or for narcotics - and as you know, the state law now provides that where a man has had a prior conviction, his sentence is increased. We charged him with these two priors; we had a preliminary hearing. At the preliminary hearing, the evidence was admitted. We went to the Superior Court and came up to the point - we went to trial, mind you, which is the important part - the trial was on, so the man was in jeopardy. We offered the evidence and the judge refused to receive it. I do not criticize his motives; I mean it is his interpretation of the Cahan case. In his own reasoning, which I do not propose to try to follow, he said that that was not taken from him at the time of the arrest; it was taken at a later time, and it was taken when you booked him at the police station. Now, we gave the standard arguments, which I know would appeal to you, that we have a right to search a man there. He is in our custody. He is practically our property at that moment. An automobile is our property. The court has held that if we take an automobile, it belongs to us. It is in our custody and we can search it from top to bottom if we have made a legitimate arrest. We have a right to look at that man to see if he has a communicable disease. We have the right to protect our jail against his importing knives or guns or narcotics into the jail. We have a right to fingerprint him, photograph him, all of those things. This just happened to be a not too large quantity of marijuana, but suppose it was three ounces of morphine or three ounces of heroin. The situation becomes even more apparent when you realize that at this

point the district attorney has no remedy. He has gone to trial, the man is in jeopardy, he can never be tried again. Knowing that we probably would not be successful, we sought a writ of mandate to compel the judge to receive the evidence. The court, I think, very reluctantly, if you will read the opinion, held that they have never mandamus'd a judge for that purpose and they did not like to do it now and they just were not going to do it. If you will read the opinion in the light of what I have told you, you will see that they were, at least in this case, very sympathetic with our position, but it points up this, if that man had ten ounces of heroin on him, I could not prosecute him because he had gone to trial, the jury had been picked, and to our surprise, at this given moment the judge makes this ruling. He made it in the light of the Cahan case. And when I say he made it, it is his interpretation. I have no right to quarrel with his personal reasons for doing it - I mean, that is his job. Now, the weakness lies in the rules on appeal.

We have no right to appeal from that. I think a consideration should be given to perhaps an amendment to the sections governing the rules on appeals whereby the district attorney would be allowed the right to appeal a ruling of that type, and I am willing to limit it where the ruling has to do with the admissibility of evidence bearing directly on the corpus delicti. I agree with the Appellate Court Circular. As a matter of fact, they suggested it. I agree with the court that that should not be a something which you can use every time the judge makes a ruling which you do not like. I should only be a ruling on the evidence which is a part of the corpus delicti. You gentlemen with legal

background know that in every other type of a case you have a right to appeal, because if the judgment goes against you, you can go to the Appellate Court and you can reverse an erroneous ruling, but the district attorney cannot reverse an acquittal, and this man walked out scot free.

I will give you another example. The other day we had a very, very sadistic murder in San Francisco. The circumstances about which we came upon it are these. A mother missed her 13-year old daughter. She called the police. The police went to the house and they found the room saturated with blood. They immediately started searching the house to find the little girl. They found her. They found her in the room of the man whom we now have arrested. Strangely enough, when they went about the house, everybody up on whose door they knocked responded and said come on in and look around, there is nobody in here. His door was closed. As they started to open the door, there was no response. It was the only room left in the house; there was an icebox pushed against it. They pushed open the door and there was the girl, and I would not attempt to describe to you the condition that she was in. The defendant was gone. We went down to the bus station, which was a logical place to look for him, and we found him there; he had bought a ticket to Los Angeles. We brought him back up to his room and while we were questioning him there at the scene, we also discovered a jacket from which a button was missing. We had the button; we found it at the scene of another murder! Now, that case may come under the rule of Cahan. We did not get his permission to look for that girl's body. We had a job to do. We did not know whether that girl was dying, whether she was safe,

she was dead, or where she was. It was our job to find her. We brought the defendant back to his room. Somebody may raise the question, well, that search was not incident to the arrest. Well, I think those things should be spelled out. Do we have a right to go back to the room to look for evidence? Do we have a right to photograph the premises? Do we have a right to look for fingerprints? Do we have a right to lumin all the rugs to see if there is blood on them? A lot of those things have to be determined.

I think the district attorneys, the sheriffs, and the peace officers, at this Session of the Legislature - I am speaking personally, this is not their presentation to you. I represent only myself and the Police Department of San Francisco - but I am not too happy about waiting for another year. True, decisions are coming down from the Supreme Court which have added very little. They have, strangely enough, in the decisions that have now come down from the Supreme Court, told us originally in the Cahan case that they did not necessarily have to agree with the federal rules. We assumed from that that they were going to liberalize the federal rules. Strangely enough they did in some instances, but in one instance they do not agree with the federal rule. They have made it even stricter. So, they have given us decisions. Decisions, there days, gentlemen, are four to three. Tomorrow, they may be the other way, four to three. I think the only place the law can be spelled out is where it properly should be spelled out. If we are to make rules of evidence, rules of criminal procedure in this State, they should not be judicially created legislation. They should be legislation created by the Legislature.

Now, I have given you those several examples; I can tell

you that narcotic cases have fallen off - the arrests - but you have to look beyond that. What is happening? The police officer is not even trying to make the arrest! But the even more dangerous thing is the day will come when the police officer will say, "Why should I bother trying to make an arrest. Even trying to make a good one, the courts will throw it out."

There has been some very shocking reaction to this. As I was coming down today, I picked up the American Mercury and I noticed an article in which you might be interested; it is in the January issue and is written by J. B. Waite, who is a very competent author - I will give you his qualifications in a moment - but his article is, "Why do our Courts Protect Criminals?" I want to make it very clear in this instance that I am quoting directly from John Barker Waite in an article which appears in the Michigan Law Review. I will give you Mr. Waite's background. He is a Professor of Law at the University of California, Hastings College of the Law, Professor Emeritus of the University of Michigan.

Here is the opening paragraph; in fact, it is the preamble to an article which he wrote in the December issue of the Michigan Law Review. It is called, "Judges and the Crime Burden," and may the record be very clear, I quote Professor Waite:

"One does not happily charge the judiciary with responsibility for the country's burden of crime, but the responsibility does, in fact, exist. Judges, though they may not encourage crime, interfere with its prevention in various ways. They deliberately restrict police efficiency in the discovery of criminals; they exempt from punishment many criminals who are discovered and whose guilt is evident. More seriously still, they so warp and alter the public's attitude toward crime and criminals as gravely to weaken the country's most effective crime preventive."

Now, again, that is a quotation from Mr. Waite, the

extravagance of which I do not necessarily agree, but it is a tenor that you will notice, the reaction you will find with judicial writers, people writing, not only in legal publications, but in popular publications. I recommend very strongly to you the dissenting opinions in People v. Cahan. I recommend very strongly to you the reading of, I think it is probably a part of the brief which was filed by Chief Parker, here, of Los Angeles, in the Cahan case; the brief which was filed by a number of district attorneys as an amicus curiae brief in the Cahan case, because I think they point out some of the legal and judicial thinking which has gone on. I emphasize one point more than any other, and it is this, that the court itself, in the Cahan case, has said that we, in effect, have reached the point where we are going to chastise the policeman. I do not know whether it was Mr. Justice Taft, or Mr. Justice Cardozo, who put it much more pithily when, taking the opposite view, he said, "Should the criminal go free because the constable has blundered?" And that is the essence of the argument that is presented.

The court itself, as I would like to repeat, has said, "We have followed this rule; it has been the rule of the State of California. We have become offended," as they may properly have been, "by some of the cases which have happened. We, thereby, therefore, damn policemen." And I can point out to you, if the time permitted, decisions where they practically accused the police of fostering a police state - trying to encourage one. Therefore, to punish the policemen, "We are now going to change the law of the State of California by judicial fiat, and we have done so." And they did it by a four to three decision.

Gentlemen, we are all human beings, and you know as well as

I do that that happens because of the composition of the court. There happened to be, at a given time, four men who felt that way; tomorrow, there could be four men who felt the other way, and then we would really be in a chaotic condition. I think it points out, without getting into the niceties of the question, as to what four men are going to vote in any particular way; it points out even more strongly that the Legislature should act and should clarify the rules on search and seizure, the rules on search warrants, the rules on the laws of arrest, perhaps explore "reasonable cause," and perhaps give a study to the entire subject of criminal procedure in the State of California. For some of these things, I believe the time is now. Some of the others undoubtedly can wait until the Regular Session of the Legislature.

Now, in closing, these are my own thoughts; I do not speak as a representative of anyone else but myself, and I am privileged to represent the police department of my city. Questions about the factual situation that has arisen in our courts, why, I will be very happy to answer, and I might say this, I have a file that thick on my desk - I would say an inch to an inch and a half - which I received. I receive a report from every one of my deputies where cases have been thrown out under the Cahan rule. I daresay I have had a hundred or a hundred and fifty of them that have been thrown out. Those cases were principally narcotic cases. If you know the record in narcotic cases, most district attorneys will tell you that we are pretty successful in our prosecutions. Now, we are not even getting the opportunity to prosecute.

I would like to check my notes for a moment and see if there was - oh, one other thing. Another thing should be clarified

and it has been suggested, you will find, in every model code on the laws of arrest, is the right of an officer to make a reasonable - to stop a person and make a reasonable request for information. The court has indicated that that is a proper thing, but we are back to the rule of four to three. We are back to a given case where in that case the court said they acted reasonably. We would like to have spelled out, or I would - and I know the police would like to have spelled out - their right to stop a person abroad in an unusual place, or at night, or a person who looks like he belongs some place else, where he could be stopped and asked reasonable questions. No citizen has any reason to object to a normal inquiry. It may be for his own protection. It certainly is for the protection of the other citizens.

I would like to think, on these constitutional questions, that we sometimes ought to get our feet on the ground. And remember, that our own Constitution is marvelously designed to protect us against our own state; but our police department is trying to protect us against the robber, the murderer, the criminal and the narcotic peddler. I think sometimes we should review and restudy our constitutional inhibitions and prohibitions in this light.

That is all I have.

SMITH: Are there any questions of Mr. Lynch?

ALLEN: Mr. Chairman?

SMITH: Mr. Allen.

ALLEN: There has been a lot of emphasis on these proceedings on the fact that the Cahan decision was by a vote of four to three, but, actually, the next case might be five to two or six to one, for all we know.

LYNCH: No. They have agreed that the next case will be seven to nothing. They have agreed to all go along now.

ALLEN: The four to three just happens to be . . .

LYNCH: But I got a four to three out of them in my favor the other day.

ALLEN: This murder that you mentioned, would it have been possible at all for you to get a search warrant under those circumstances that would admit you to that room?

LYNCH: No. We had no reason to believe - I do not know whether we can get a search warrant for a body. I know of no provision for a search warrant - I am not being facetious, either.

ALLEN: Even if you knew it was in there?

LYNCH: No, I don't think so. But, there was another element involved in that that points out the police aspect. We do not know whether this girl is dead, alive, or dying, and getting a search warrant - that happened, I might add, at five o'clock in the morning - would have required anywhere from the minimum of an hour to two or three hours, and I do not think a search warrant would issue. We had no reason to believe the girl was in there. The question arises, I mean, suppose they reversed it? What would we do with the body, give it back?

ALLEN: Now, this movie that we saw just before lunch - you saw that I suppose?

LYNCH: Yes.

ALLEN: Do you have any cases like that?

LYNCH: It is dated. The court recently held that the matter of whether - there is one point there, I think, might be a little bit clearer, and that is the question of whether he was arrested

before or after. That is not important. If you have reason to arrest the man, the evidence you secured is good. If you had reason to believe he had narcotics in his possession, and you searched him, found the narcotics, and then arrested him, that is a good arrest. There are those who disagree with me, but the Supreme Court recently held that.

ALLEN: Oh. Have you had cases in the past where police officers have gone to a man whom they suspect, perhaps without any cause for it, of being in possession of narcotics. They search him and they find it. You have a case. You have had cases like that, haven't you?

LYNCH: Yes, that is right. And I will agree that in that area perhaps we should have some definitive legislation. I believe that in instances like a narcotics case, where those officers, as they did here, had information which they had reason to believe was reliable; it came from a reliable source, another hop man, and it was given in such a way that, although dramatized, they had reason to believe that it was correct, so they were acting reasonably. And that is a reasonable arrest in my book. They were not prowling; they were not prospecting; there were not guessing; they were working hard at their jobs to suppress the narcotics traffic.

ALLEN: Do you have cases similar to that?

LYNCH: Yes.

ALLEN: Where you cannot prosecute now.

LYNCH: That is right. We are testing right now. We do not know what field we are in. I take this position in my own office. I will not issue a search warrant merely upon the information of a stool pigeon or a transient informant, but an officer will come

to me and say, "I have gotten this information from a source from which I have gotten information in the past, and it has proved to be reliable. I also know the man involved and I know him by reputation to be a narcotics peddler. He has been arrested for it before." And if he will add a little more - "I have noticed him acting very cladestinely," say - I will issue a search warrant because I think that is extremely reasonable. But the point is, it is not spelled out in any statute. I may be wrong.

I found out if you read the next case to Cahan, you will find People v. Ferger. I drew the search warrant; I presented it to the judge; the judge looked it over and the judge issued the search warrant. Afterwards the search warrant was quashed. We went to trial and we had to give the evidence back, but we photostated it and introduced the photostats over the objection of counsel, and the photostats were allowed. It went up on appeal to the Appellate Court, and the Appellate Court upheld the convictions; the Supreme Court reversed it and castigated us very bitterly for our sneaky way of doing business. We went to every court in the land and got their approval. We had a search warrant. One of my deputies said that was the mistake we made.

SMITH: Are there any other questions? Tom, thanks, very much.

LYNCH: Thank you.

SMITH: Judge Hewicker, would you like to favor us with your sage words of wisdom? This is Judge John A. Hewicker, H-e-w-i-c-k-e-r, of the Superior Court in San Diego, now in charge of the criminal calendar, Superior Courts in San Diego.

JUDGE JOHN A. HEWICKER: Gentlemen, I am not going to read you any law, and I have no prepared speech. If I had prepared one,

I don't know, with the present atmosphere, whether I would be able to see well enough to read it. I was going to say this morning that I appreciated the pleasant atmosphere that we had here, but something happened at noon and it is not so pleasant. I hope it is not this way very often.

I am in charge of the criminal department in San Diego, and our criminal business is so well up we are only 20 days behind down there, so that I could take off today and come up. I noticed this morning that Judge Hunt and Judge Mosk's business was flourishing in Los Angeles, and they could not take the time off.

We do not have the problem in San Diego that Mr. Lynch apparently has in San Francisco. I do not know whether we have more resourceful police officers, or smarter police officers, or what it is, but when the Cahan decision first came down, and before the police knew the rules, I think I had about ten motions for setting aside the information, and I set aside about half of them. The other half I refused to set aside, and in all but two cases the Supreme Court refused to issue a preliminary writ to have a hearing on the merit. One of those has come down and was sustained as a dismissal.

Our municipal courts in San Diego are very liberal in their interpretation of the Cahan decision. As far as the Cahan decision is concerned, I have said numerous times, and I will say it again, that I do not think we would have ever had that decision turn out that way if police officers, instead of finding a million dollar bookmaker, had found \$5000 worth of narcotics. I think the decision would have been the other way. And I say that, not because the million dollars would make any difference, but there seems to be

somewhat of a feeling throughout the State that bookmaking is not a very serious offense. Personally, I think it is a very, very serious offense, because it robs so many people of their livelihood, at least those that patronize the bookmaker.

As has been stated, the statutes on search and seizure are obsolete. All but one of them was enacted in 1872, and it really puts the police at a disadvantage if they have to follow them literally.

I have a suggestion to make that when you get a search warrant, I do not think the police officer has to do more than knock at the door. I do not think that he should have to announce that he is a police officer and that he has a search warrant, because the minute you do that, if you have bookmaking activity going on in the house or you have narcotics, there is always one or two well working toilets in the house and the evidence is all washed down the toilet.

In the old days, in 1872, when the statute was enacted, we had these - I was born on a farm - we had these little Chic Sale places about 50 yards from the house, and if two police officers arrived at the house, one at the front door and one at the back door, and announced they were police officers, there was no place in the house where you could dispose of the contraband. And I do think the statute should be amended to comply with present day conditions. The commission of crime has not been at a standstill. The technique of committing it has improved, and I think the technique of coping with it should also be improved, and the laws should be amended so that the police will not be interfered with too greatly.

Personally, I do not think there was any need for the Cahan decision. If the California Supreme Court had done what the United States Supreme Court did on cases that arose in California, for instance the Rochin case, and said this has gone too far, we will not approve it, if we could have gotten four or five of those decisions, or probably six or seven, we would have known where we were without upsetting the entire procedure.

I have compared the Cahan decision to the action of a young bride who was just married and she found a bedbug in the bed and figured the quickest way to get rid of it was to burn down the house, which she did. The Supreme Court, I think, in the Cahan decision, instead of seeing a bedbug, saw a mirage and they burned the house down anyway. But I think that the search warrant should be subject to being served night or day in all instances, should be on - in all cases on information and belief, and as far as the last six sections of searches and seizures are concerned, I think they could be repealed without affecting anything - those are Sections 1537, 1538, 1539, 1540, 1541, and 1542.

Now, if you are going to make a provision that the police officer does not have to announce that he is a police officer or that he has a search warrant before he demands admission to the house, Section 844 of the Penal Code should also be amended to that extent because that has the same provision in it, and there is also a provision in 844 of the Penal Code which provides that a private citizen may enter a house, and I think that should be eliminated. I see no reason why he should have that privilege.

Now, as far as the affidavit particularly describing what the officer is looking for, I think that should be taken out and it

should be in general terms. A person may deal both in heroin and marijuana. If a police officer made a mistake and put in there marijuana and then they found heroin, you might run into difficulties. As far as making inventory is concerned, the statute provides inventory shall be made forthwith and left with the person from whom it is taken, and one shall also be given to the magistrate. I do not think there is any necessity for doing that forthwith; if he got it within ten days, I think that would be sufficient.

I was agreeably surprised in the recent cases that have come down from the Supreme Court. Following the Cahan decision, I thought that there would be considerable dissenting opinion, but I notice that Judge Traynor, who was the author of the Cahan decision, has authored all of the subsequent cases that have come down, at least those that I have read, and I notice that the opinions so far have been unanimous, so there has been no dissent.

If you are going to enact legislation to restrict the police officers to any extent, I think the same provision should be put in the Code of Civil Procedure to restrict private individuals and private detectives, and so forth. Certain insurance lawyers obtain evidence illegally; certain plaintiff's lawyers obtain evidence illegally in personal injury cases; and I think it is a known fact that in many of these divorce cases, searches are made that are improper. Of course, they do not come under the Cahan decision, being civil cases, but I think if you put the same restrictions on searches and seizures and the introduction of evidence in civil cases that you do in criminal cases, it would be very, very equitable. There are some one or two people on the Supreme Court that maybe if you put the same restrictions in civil cases that would be somewhat

reluctant in holding a search and seizure to be invalid in criminal cases, because they seem to lean that way. Those lawyers who practice, I think, know what judges I refer to. I will not have to mention any names when I say that I have the highest respect for those judges, but they have certain leanings, as all of us do, consciously or unconsciously.

So, that is about all I have to say. I do not think I have contributed very much to your proceeding here. I am speaking for myself; I am not speaking for the other seven judges in San Diego County on the Superior Court Bench. We are getting two more in a few days, I hope.

SMITH: Are there any questions of Judge Hewicker?

Very well, thank you very much, Judge.

HEWICKER: I am glad to be here.

SMITH: Now, Mr. Wirin, you said you wanted 10 or 15 minutes before 3:00 o'clock, do you want to talk now? Please come forward. This is Mr. A. L. Wirin, W-i-r-i-n - if I am wrong, correct me - an attorney at law, representing the Civil Liberties Union, or League.

A. L. WIRIN: You are right, but it is the American Civil Liberties Union, and we made sure that the Americans also know.

SMITH: You are a practicing attorney in Los Angeles. Is that correct?

BRADY: Will you spell it once more for us?

SMITH: W-i-r-i-n, A. L. Wirin.

WIRIN: I think I can be most helpful to the committee if what I do is to make some informal comments on questions asked by members of the committee and perhaps, but respectfully and certainly not in an personal way, upon the statements made by other witnesses

whose views are different from mine and the organization I represent.

First, with respect to the matter of legislation, it is my view that many of the provisions in the arrest sections of the Code and in the search and seizure section might very well be reviewed and clarified. On the other hand, I would not agree with the very able and conscientious District Attorney of San Francisco that there is a need for a special session or that there is need for urgent and precipitate action. These provisions have been in our statute books since 1872, and I see no emergency in the State which requires any immediate revision through a special session.

Now, of course, a great deal has been said about the Cahan case. I have said that I think revision is necessary, but may I make this respectful suggestion of caution. Whatever the Legislature does, it cannot write a complete blueprint to deal with every situation. Whatever the Legislature does, there would still be a need for interpretation by the courts, and that should be borne in mind, and that leads me to a discussion of the Cahan case. You will recall that in the opinion of the majority of the court, after making this ruling, it announced that it would undertake to prescribe rules, or to concern itself with rules applying the Cahan case. There is good testimony from a number of witnesses that the Supreme Court has carried its promise to the Legislature and to the people out. There have been a large number of cases; the Supreme Court of the State took over the cases from various district courts of appeal, a very unusual step, in order that they make a decision by the highest court of this State expeditiously and immediately. It has already decided more than half a dozen of those cases. Strangely enough, as a matter of fact, disappointingly to the American Civil Liberties

Union, some of these decisions have clarified the Cahan case in a way which broadens the authority of the police, at least it broadens it in terms of the Cahan decision. The Supreme Court of this State, in these decisions which have come down during the last fortnight, has already clarified the law of arrest in a very substantial way. It has said that in determining what is reasonable, the opinion of the police officer is to be given very great weight. After all, he is on the spot, and the hindsight of a court ruling upon the matter should consider that he has to make the first decision.

Moreover, in the Tarantino case, as perhaps you will recall, the Supreme Court has said that even where evidence is secured illegally, where there is substantial other evidence, the judgment will not be set aside. So, it seems to me that a fair reading of the Cahan decision, and what our Supreme Court has done subsequent to the Cahan decision, there is no warrant for alarm or very great concern that something must be done immediately and urgently.

Now, I want to address myself to the two bills that Mr. Allen has proposed. I am quite in favor of one of them and largely opposed to the other one. I am in favor of the one which imposes liability upon government agencies for the lawless conduct of police. I think in the form proposed by Mr. Allen, the other bill providing that the fact that evidence is seized illegally should not be a ground for suit against, is probably unwise. In the first place, it is a direct encouragement to police to engage in illegal conduct, for it tells them openly, through the Legislature and representatives of the people, that their illegal conduct may nonetheless be acceptable to a court. Moreover, may I suggest that there may be some very serious constitutional questions. In the Tarantino case, it

it was urged upon the court that since the Legislature had adopted Section 653h, which provides that the installation of dictaphones by private persons is illegal - criminal, rather - and purports to immunize police officers from such criminal liability, it was urged in that case that the admission of evidence through dictaphones was proper, and in the Tarantino case, our Supreme Court said that the Legislature could pass no such constitutional legislation. In other words, if the Legislature were, by permanent legislation, to provide the installation of dictagraphs in people's private homes, it is lawful and that the results of such installations should be received by the courts. Our Supreme Court has already said that that kind of legislation is unconstitutional, so I am suggesting that that problem is not without some constitutional doubts.

Now, so much has been said by other witnesses in criticism of the Cahan case, and that is proper - Americans have the right to criticize anyone else, including the courts - but let me remind you that there are other states where the courts have had the Cahan decision in that evidence illegally seized has not been admitted - there are some eighteen such states - and it has not been suggested that in those states which have enforced the Cahan decision throughout the years, there are greater violations of law than in those states where the Cahan decision is not followed. Moreover, the Cahan decision has been law in the federal courts for many, many years. No one has suggested, certainly Mr. J. Edgar Hoover and the F.B.I. have not suggested that the exclusion rule in the federal courts, which now our Supreme Court borrows from the federal courts, is a rule which interferes with legitimate and efficient law enforcement by the federal law enforcement agency. It may be the Cahan decision

is an unwise one. I doubt whether it is unwise, but it seems to me some time ought to be given so that the sands can have time to settle and the Supreme Court of our State can continue to clarify the matter. Our Supreme Court has said that experience in this State without the Cahan rule has encouraged police to violate the law and that the Cahan decision is a result of experience. I suggest some experience with the Cahan rule for a little while, anyway, to see whether or not it will have the harmful effect upon efficient administration which police officers, honest, sincere and zealous in their duties, fear, or whether it will be as good a rule for California as it has been for the federal courts for forty years.

Now, a word about Mr. Allen's proposal for legislation providing for remedies.

SMITH: Let me interrupt one minute. I do not think that these are necessarily Mr. Allen's proposals. These were just some suggested bills that happened to be sent to him for the consideration of the committee. None of them are offered as such. They are here for our consideration.

WIRIN: May I just say then, on my own, that I would urge upon you that you explore and ultimately recommend some legislation which would give some real redress to a person who has been the victim of police lawlessness. Everyone, so far as I know, seems to be in general agreement, both a majority of the court in the Cahan case and the minority of the court in the Cahan case, that the present remedies for violation of the law by police are inadequate; and it is only fair and proper that where a police officer does something honestly, but in excess of his authority, that his

employer be accountable to the victim rather than that he be required to pay out of his own pocket for doing something which he thinks is proper but which turns out ultimately to be improper.

Now, sort of a final word, or a couple of final words. If you ultimately recommend legislation, may I urge upon you that you recommend legislation which clarifies searches and seizures so far as search warrants are concerned, yes, but which narrows the authority of the police to make searches without search warrants in limited cases, to make searches without search warrants only in emergency or only in urgency. In other words, I am of the view that the application for a search warrant provided in our Constitution for California, provided in the Constitution of the United States, provided in every constitution of every state in the Union, is an important right which should be adhered to. Now, I am not saying that a search warrant should be applied for in every instance. I am saying that a search without a search warrant should be the exception rather than the rule, and I am saying that it has been my experience as a lawyer, and the experience of the American Civil Liberties Union, that the application for a search warrant, in practice, by the police has been the exception rather than the rule. It should be the other way.

One kind of final word. Certainly, I have no purpose in interfering with the authority, and the efficiency of the police in investigating crime and in effectively prosecuting the violators in crime. Mr. Lynch said these criminals are engaged in a low business and a dirty business and they should be prosecuted, and that business should be wiped out, but you will recall that many of these decisions of the Supreme Court of the United States,

and the decision of our court in the Cahan case, talks about the police aping the conduct of the criminals by engaging in a dirty business, particularly with respect to the installation of dictaphones in private homes.

I think there was a question from one of the Assemblymen, perhaps he is not here, about the distinction between illegality and unreasonable. When what is involved is what is involved in the Cahan case, the surreptitious installation of listening devices in people's homes, no matter how guilty they may be, is is not merely - I am just about through in a couple of minutes - it is not merely the engaging of illegal conduct by the police. In the Irvine case, the Supreme Court of the United States, in an opinion in which Chief Justice Warren joined, considered that kind of conduct by the police as the commission of a crime and said it constituted the offense of burglary. You will recall that Mr. Justice Jackson, who wrote the opinion, and Chief Justice Warren were of the view that the conduct of the Long Beach police was a violation of the Federal Civil Rights Act, and recommended that the record of the case be turned over to the Federal Department of Justice for prosecution of the Chief of Police of Long Beach for a violation of the Federal Civil Rights Act.

Now, what I am trying to say is this kind of conduct by police officers, conceding their zeal and the conscientiousness - no one suggests this conduct was dishonest in the sense that it was intended for the private benefit of any police officer. It was done by a police officer who felt it was his duty to do it in order to apprehend criminals. What I am saying to you is this kind of conduct is conduct which the courts have said, and which I think the Legislature should acknowledge, is conduct which is offensive to common decency,

and it is for that reason that a majority of our court ruled as it did in the Cahan case; it is for that reason that Chief Justice Warren said what he did.

And so, and this is my final word and I shall be glad to try to answer any questions you may put, gentlemen, we are dealing with a very serious matter; serious on the one hand in that crime is serious, but serious, on the other, that in a free country and in a free democratic State of California, it seems to me the Legislature cannot tolerate, or permit, or suggest that police officers have the right to violate the law in order to enforce it.

I have concluded my remarks.

SMITH: Are there any questions of Mr. Wirin?

ALLEN: Mr. Chairman?

SMITH: Mr. Allen?

ALLEN: Mr. Wirin, you recall the case Mr. Lynch mentioned of the body of the girl that was found behind the door of the room; they did not know what was in the room until they pushed the door open. What would you suggest they do about that type of a case?

WIRIN: Well, in the first place, there could be no objection to amending the search and seizure statute to permit a search for a body under such circumstances, and I would be for it. Now, and moreover, if this information came at 5:00 o'clock in the morning, I would say they need no search warrant.

ALLEN: Well, how would they get in the room, though, when they did not know what was in the room. Now, they entered somebody's room. I suppose it was a place of this man's residence, his home, where they had no information before they entered that there was any evidence of a crime inside of it. Now, would you favor

amending the laws of arrest and search and seizure to permit the police to enter a room or a house under those conditions?

WIRIN: Well, I did not hear his example too closely. They had some suspicion that there was a body somewhere, or near there, or there?

ALLEN: No, they did not even know there was a body.

WIRIN: What were they looking for?

ALLEN: They were looking for a girl who had disappeared.

WIRIN: Well, I think they would have a right to enter a place where they suspected the girl was. I think they would not have a right to enter into every home in the City of San Francisco. In other words, and the law is clear that if what you are looking for is something specific, you have a right to make a wide search for the specific matter. What I am opposing is general searches for anything that may come up.

ALLEN: Well, they were certainly looking for a girl; they knew the name of the girl, and so forth; they knew where she disappeared from. If I understand your statement, you would favor us amending the statutes to permit them to make a search within that area.

WIRIN: Well, I would favor amending the statutes to permit the search for dead bodies. One of the arguments against the present search and seizure statute is that the subject of a search could not be a dead body. I would favor clarifying the search and seizure statutes, and I would favor fairly strict enforcement of those statutes by the police.

ALLEN: Well, they were not looking for a body, you understand. They found one. But when they pushed open the door, they did not know there was any body at all. But as I understand your statement,

you are willing for us to amend the statutes to permit, in that type of case, the police officers to push open the door and say that that is a legal entry? That is your position?

WIRIN: If they have reasonable cause, and that has been defined as a strong suspicion which an honest person under the circumstances would have, if police have reasonable cause, I would permit them to do it.

ALLEN: Now, you saw this film - or did you see the film this morning?

WIRIN: I stepped out, but I think there was a little misunderstanding between you and Mr. Lynch, if I may say so. Mr. Lynch told you that that film was dated; that under the recent decisions of the Supreme Court in our State, that that arrest was lawful and the evidence was lawfully seized, and I agree with him, so there is nothing about that case which requires any legislation, though I would have no objection to such legislation.

ALLEN: Well, let me see if I understand you correctly, then. A police officer sees a man who has a reputation or is known as having at sometime been in narcotics traffic. The police officer does not know that he is engaged in that at the moment. He goes over and searches the man and finds narcotics on the man's person. Do you favor a position that that is a legal search, arrest and seizure of the evidence?

WIRIN: No, Mr. Allen. There was more evidence in that case. What happened was, the police got some information from a person who seemed to them to be reliable and who knew what he was talking about. Now, the law is reasonably clear, as Mr. Lynch stated, that where police officers get information from a source, including an

informant, which information they believe to be reliable, and then they make an arrest, that is a lawful arrest, and then they make a search pursuant to a lawful arrest, which is what they did.

ALLEN: Well, they did not have any information that named this person, whom they searched, or identified him in any way.

WIRIN: I think the courts would say in that case that that was a lawful arrest. The officers had some information; it appeared to them to be reliable; they are the judges as to reliability, and therefore, the arrest is lawful. I would agree.

ALLEN: You have no objection to the arrest under those conditions or of spelling that out in the statutes that that is a lawful arrest?

WIRIN: Moreover, may I say this - I am glad you are asking me these questions - I am in favor of giving police very broad power to arrest and of not making them, or even the city, liable for false arrests, generally, but I am in favor of limiting the authority of police to make searches, because I think that is offensive. I think in a civilized, large community, innocent people get arrested, but there is not so much justification for innocent people to have their homes searched and ransacked, or dictaphones installed. So, if you want to give broader power to police to arrest, I would have no objection, but please narrow their power to search and seize papers and documents and install dictaphones. These are reprehensible practices which smack of the totalitarian state.

ALLEN: You said it was all right to make the search if they find the body.

WIRIN: Yes. Now, there is another problem, however. I want to qualify one thing. The present law is, and I think it is

probably sound law, that a search made at the time, or then pursuant to a lawful arrest, is a lawful search. Now, I think it would be most undesirable if you broadened the law of arrest and if police officers then resorted to arrests in order to make searches, and that happens very often. Police officers in this community invade a person's home and say, "You are under arrest," and then they search the place and they find nothing, and the arrest isn't even completed. The police officers think that they are within the law because they have made an arrest, and therefore, they have made a search. What I am saying is, if you do broaden the right to arrest, narrow the right to make searches and seizures and try to find a formula which does not permit police officers to use arrest as a guise for, or the excuse for making a broadside search. That may be quite difficult, but I do not have an exact formula at hand at the moment.

ALLEN: Well, take narcotics, for example. As I understand it, they are usually found by searches of a person's home, or his car, or his clothes, and you want to limit the power of the police to make those searches?

WIRIN: I would have no objection to a search of the person. Traditionally, historically, when an arrest is made, a search of the person has been recognized as lawful, the reason being that the person arrested may have a gun and may use it on the officer. The officer is entitled to protect himself.

ALLEN: But suppose the officers do not arrest the man, or the cause of the arrest is what they find after they have searched him?

WIRIN: If they do not arrest the man, they certainly have no

right to search him, or anything, without a search warrant.

ALLEN: Well, suppose we amend the statutes to permit them to make the search then. Do you object to that?

WIRIN: Make a search without an arrest?

ALLEN: Yes.

WIRIN: I would not object to it if the statute is complied with and they have probable cause and a magistrate says so. I would certainly, wherever possible, require a police officer to submit something to a magistrate or a judge so that a person, other than a police officer, probably more objective, can make the decision as to whether the invasion of a person's rights are permitted.

ALLEN: You mean you want the magistrate to pass on this before the search takes place?

WIRIN: If it is practicable. If it is practicable to get a search warrant before the search takes place. If the police know that certain places are suspected, a certain place is a bookie place, and they have time, which they should have if they know this place has been in business for some time, to get a search warrant, they should.

ALLEN: That is all right in the bookie place, but how about the narcotics that are there momentarily and gone? What are you going to do in a narcotics case?

WIRIN: If it is not practical to get the search warrant, if there is not time, I think the present law permits arrest to be made where they have reasonable cause, maybe honest suspicion, and they may make searches pursuant to such an arrest.

ALLEN: Would you favor a statute that gives a very broad power of arrest, search, and seizure in narcotics cases only?

WIRIN: I think it would be a mistake to single out one area from another, though I am sure the police feel there are certain areas that are more sensitive and are more urgent than others. I think if you pick out one area, you will be asked for another area, and you have gone in the wrong direction. You have taken a step in the wrong direction.

ALLEN: Well, suppose the police installed dictagraphs in an adjoining room, or in a house some way, and they get evidence through that means that there is a big narcotics traffic going on there. Do you have any objection to using that as a basis for search and . . .

WIRIN: The courts seemed to have ruled that the installation of detectaphones, namely, instruments outside of a man's home, is lawful, and while I think it isn't nice, it is probably law, but the invasion of the home, I think, is immoral and reprehensible and inexcusable.

ALLEN: Even if the man is using his home as a place of business for the narcotics traffic?

WIRIN: I think if the man is using his home for the most nefarious business imaginable, the invasion of his home and the installation of a dictaphone is burglary - so Chief Justice Warren said and Justice Jackson. It is a crime, and I think police officers should not commit a crime in order to detect crime or to prevent it, and I think the law is adequate to deal with that situation without the installation of dictaphones.

ALLEN: Well, don't you think the rest of us have some constitutional right to be protected against somebody using his home for that type of business?

WIRIN: Certainly. They should be careful . . .

ALLEN: Well, which is the most important right, that of the public at large, and all of us here, to be protected from that traffic, or the right of the individual who is operating? Which one weighs the most?

WIRIN: Well, it is difficult for me to answer that question, but here is my answer to it. I will answer it in two ways. In the first place, I do not think the people of California or the Legislature have the choice of having to choose one or the other. I think both can be squared, and that the present law and some clarification of the law by the Legislature is adequate to the occasion.

Secondly, if I may say so, when a criminal's home, including the man who deals in dope, is invaded unlawfully, the right of every person to be free in his home is at stake. It is not merely a question of the right of one guilty or undesirable person being taken away. And that is the reason, as I understand it, for the court decisions. In the decisions of a court, they do not care, as the judges said, for a huckster of morphine; it isn't out of concern for him. It is because if you allow invasion of his home, your home and mine, too, are not free from such invasion, particularly, if you leave it entirely in a chief of police or police officer, no matter how honest or zealous he is. If you put it up to a judge, there is a further protection for the individual.

ALLEN: The Attorney General was quoted in the press recently as saying that he is going to investigate all organizations that appear before legislative committees, or some such thing, and I wonder if you could tell us, just briefly, what the American Civil Liberties Union is? I have heard of it, but I never did understand it.

WIRIN: Well, the American Civil Liberties Union is an organization which has been in existence some twenty-five years. On our local advisory board are Bishop Baker of the Methodist Church, Dore Schary, whom you know, and a number of educators. We are interested in constitutional rights for everybody.

ALLEN: Are you a salaried employee of this organization?

WIRIN: I am on a small retainer from the Civil Liberties Union. I did the Rochin case in the Supreme Court.

ALLEN: Pardon?

WIRIN: You have heard of the Rochin case, an Appellate Court case we referred to? I did that case in the Supreme Court. We have filed briefs in the Cahan case and all those later cases.

ALLEN: Who finances the American Civil Liberties Union?

WIRIN: People like you, and everybody . . .

ALLEN: Not me.

WIRIN: who believes in civil liberties for everybody.

ALLEN: Does the Communist Party contribute financially to the American Civil Liberties Union?

WIRIN: Not one cent.

ALLEN: The don't. Are you a member of that party?

WIRIN: I am not a member of that party. Never have been.

ALLEN: Thank you.

WIRIN: Years ago, I appeared as a friend of a court in a case involving The Los Angeles Times, and I have appeared for the Civil Liberties Union in many cases for people whose views I disliked and whose activities I considered very undesirable.

SMITH: Thank you. Mr. Brady, do you have any questions?

I would like to try and clear up one thing here. Judge Hewicker,

we were talking just before we reconvened here about the Supreme Court case about three weeks ago, I haven't read it myself completely, but my understanding was that you told me in that case the court says, like the chicken and the egg, it did not make any difference whether you searched first or you arrested first, if a crime had been committed.

HEWICKER: There was a case came down - I do not know if it was the Martin case or what case it was, but they raised the point that the search was made before the arrest, and as I remember it, the Supreme Court said that it was immaterial whether the search came first or the arrest came first.

SMITH: That would be my opinion, too. Now, Mr. Wirin, you mentioned about the film being dated and that the evidence would be admissible. I don't think that that would necessarily follow, would it, Judge?

HEWICKER: I think it would. The police had information from someone that someone was committing a crime. They pointed out in what area it was, and so forth, and then they recognized the fellow that night, by the car, whom they knew to be a narcotics peddler.

SMITH: Now, they did not have evidence at all about the burglary. They did not even know that crime had been committed. It had not even been reported, and yet they found this stolen goods. Now, how about that? Now, Judge Fricke, don't you consult . . .

HEWICKER: I think they could be prosecuted for burglary.

SMITH: Oh, you do.

WIRIN: I accept the Judge's ruling on that.

SMITH: Thank you, Mr. Wirin.

ALLEN: May I ask those judges a question?

SMITH: Yes.

ALLEN: Judge Hewicker, suppose the police in that film had not had this report from the informant, but they are on a narcotics detail and they know there is a trade going on in the city and they know some of the people who are involved, and they see this fellow who has been in the traffic before and they stop him and search him and they find the same thing?

HEWICKER: Well, I had the Simon case down in San Diego which has been decided by the Supreme Court. What happened in that case, they saw some colored boys going around the warehouse area about 2:00 o'clock in the morning. They were not violating the law, they were running around there, and they were suspicious that they might commit a burglary. They stopped them and searched them and found marijuana on one and they found liquor on the other. I set aside the information and was sustained, that they had no cause to believe that these people were violating the law. They had no reasonable cause. So, if they saw this man out in that area and they did not know that he had been peddling narcotics, and so forth, he was just a stranger to them, I do not think that they had any right to search him.

ALLEN: Thank you.

WIRIN: May I just say this, almost repeating what I started with. These problems, in their refinement which we are now discussing, are matters which the Legislature is going to have to leave to the courts in a large degree. You could not pass legislation which would deal with each specific problem or you would have statute books that never end, so some discretion will have to be left to the courts.

SMITH: Thank you, Mr. Wirin.

Judge, let me ask you another question. This is just a personal matter. When I was in the F.B.I. down in Tennessee, we were chasing hijackers of liquor and we did not have any idea who most of them were. We used to ride the roads at night. About 1:30 one night, a deputy sheriff and I searched an automobile which was parked in front of an eating place because it had a Florida license and we just thought they might be some boys that were committing a crime. We found an arsenal in the backend - about five guns, a tommy-gun, and some others. We took them in and arrested them because of the guns. One individual had escaped - a life term - from Atlanta Penitentiary, and the other fellow was wanted for murder. He had been pardoned, had 120 years once and Governor Talmage had pardoned him. They had just kidnapped a doctor and left him bound in Georgia. Now they are both in Alcatraz, or were the last time I heard. Now, just for fun, as a hypothetical case, was I way off the beam and illegal under the rule at that time? I had no reason, whatsoever, to believe that they had committed the crimes they committed.

HEWICKER: The federal rule is that if a deputy sheriff or a civilian violates all the laws he wants to and gets evidence, the federal courts can use it.

SMITH: But if they had made a seasonable request to return all those guns in the evidence, where would I have been?

HEWICKER: It would not have made any difference, because it was not a federal officer who made the arrest.

SMITH: I was. I made the arrest. I was a federal officer.

HEWICKER: You were a federal officer?

SMITH: Yes, sir.

HEWICKER: How about the other fellow with you?

SMITH: He was the deputy sheriff, but I arrested them. I booked them "hold for the F.B.I."

HEWICKER: I think if you had a deputy sheriff there, I think it was valid. Now the whole thing is this. If California would let federal officers get evidence and then turn it over to the police officers and let them be prosecuted in the state courts, even though illegally obtained, that would be one thing if they are going to follow the federal rule, because in the federal courts if a state officer or a private citizen gets evidence, regardless of how illegal, they can use it in the federal courts as long as it is not a federal officer that does it.

SMITH: All right.

HEWICKER: So, I think probably the deputy sheriff saved you.

SMITH: Judge Fricke, would you like to come forward? This is Judge Charles A. Fricke, F-r-i-c-k-e, Judge of the Superior Court, Los Angeles, California.

JUDGE CHARLES A. FRICKE: I have a little memorandum here that may be of a little assistance to you.

SMITH: Thank you, very much, Judge.

FRICKE: I agreed with Judge Hewicker quite thoroughly with one exception. He said he did not think he contributed anything. I disagree with him, I think he did.

I am going to have to disagree with the gentleman from San Francisco, because in the first place he made some statements that indicate that he does not know. When he said there is no way of defining reasonable cause, or probable cause, he has failed to

discover that there are at least between twenty-five and fifty decisions of our appellate courts from all over the State of California defining it; and one of the earliest ones is an Ex parte Vice, 5th Cal. App., but that is before my time. Mr. Wirin gave a very practical definition. In other words, when there is a strong suspicion which would justify a reasonable person in entertaining a belief, that constitutes reasonable cause to believe that the situation exists.

Judge Hewicker has reported, too, the Simon case, and there is something in that connection that I think will be interesting to you. While they disagreed as to the legality of the search, they did hold there definitely - and this should be a good deal of consolation to the police officers - that the officers, notwithstanding the fact that the search of the person was illegal, were in their full rights in running their hands over the outside of the clothing of the individual to ascertain whether he had weapons, for their own protection and to prevent an assault upon themselves. So, even in the case of an illegal arrest and an illegal search, a man can go that far. And that goes back to what the gentleman from San Francisco said, that a man might have a deadly weapon on his person and they could not do anything about it. I think he is mistaken about that.

He also advanced the very novel rule of suggesting statutes that the district attorney could appeal an acquittal. I am afraid he will have to read some of the decisions on that also. There is a little provision in our State and Federal Constitutions about former jeopardy that would have to be amended before we could do that.

It may be of a little assistance to you to give you the decisions since the Cahan case, and may I preface it by this. People v. Cahan really reversed People v. Fred Moyen, and the Fred Moyen was predicated upon the case of People v. Le Doux, and it is rather interesting to know the historical facts, that in the Moyen case they did have a search warrant, but it was illegal, and I will get the search warrant situation in a moment.

One of the cases that came down was People v. Brown. That is 45 Cal. 2d. It is not yet in a bound volume. There, the defendant was walking down the street and had her hand clenched. That is all the information or grounds for belief the officers had. They held there that the arrest would be illegal and the search would be illegal. They did actually find some heroin. They also held in the Brown case, the fact that you find contraband upon a search will not justify the search if the search itself was illegal.

Now, those are the cases in which we might say they decided against the prosecution and the police. Let us look at some of the cases that they have decided the other way, and this touches some of your hypothetical cases.

I People v. Coleman, reported in 134 Cal. App. 2d - these are all still in the advance sheet stage - the officers had probable cause to believe that the defendant was selling narcotics. They went into his place of business and arrested him and searched the premises and seized the narcotics, and it was held illegal.

The question has been suggested - I think it was asked of Judge Hewicker - whether if you have a legal arrest and a legal search, what happens if you find a crime which was not anticipated, and that comes along Mr. Smith's question. We have a case on that

People v. Baker, 135 Cal. App. 2d. In that case the fellow was an ex-convict and had a gun on him. Now, he was arrested for drunk driving. They impounded his car, searched the car, found the gun, prosecuted him, and the conviction was sustained, but we have authority now that if the arrest is legal and the search is legal, and you find evidence of a crime other than that for which the arrest was made, it can be used.

They have also held in the case of People v. Beard, 35 ACA 795, that as an incident to a lawful arrest of the defendant who was arrested in a car, that the car might be searched.

They had a very interesting bookmaking case, People v. Martin, 45 Cal. 2d. The officers looked into a window, they observed that the door was barred and they observed what looked like to them to be bookmaking paraphernalia. They crawled in through the window. The court said since the door was barred and you could see it from looking through the window, they were justified in believing somebody was inside. Seeing the paraphernalia, they were justified in believing that bookmaking was probably being conducted, and the search and seizure was held legal.

Another interesting case that goes a little further, People v. Dixon, 136 Cal. App. 2d. The officers arrested the defendant on probable cause - this was a probable cause arrest - an arrest that was legal. The defendant resisted arrest, but in the struggle they got the garage key away from the defendant. Now, bear in mind, the arrest was not made in the garage or at the garage. They went to the garage, found narcotics, and the conviction was sustained.

In the Ferrara case, 136 Cal. App. 2d, they held that the search of a person upon a legal arrest does not require a search,

warrant, and in the Winston case, 136 Cal App. 2d, they arrested the defendant in his apartment and they held the search legal.

Now, I think - again, I am sorry to disagree with my friend from San Francisco - but I do not think there is any ambiguity or difficulty understanding what our search warrant procedure is under the present law. The difficulty with the present search warrant seizure is that it requires definite information as to the definite location of the property, and particularly, as to its particular character. I think there we have a room for broadening the search warrant procedure. I think a general description should be sufficient without requiring a specific detailed description. In other words, it has been suggested here if you have probable cause to believe that there are narcotics in a house, you should not be required to enumerate the narcotics or state in what particular form it happens to be, whether it is heroin, morphine, or what it is. I think the positiveness required in an affidavit for a search warrant should be removed. If we take the position that upon reasonable cause an arrest may be made, I think it is just as sound to take the position that upon legal and reasonable cause, a search warrant may be issued.

There is another proposition that may have been touched on this morning. I hope I am not transgressing on somebody else's idea, but it has already been said that our law of arrest is very antiquated, not merely as to procedure, but because the law has been substantially changed. When, in the old days, we referred to felonies and misdemeanors, we classified as felonies those things that are obvious felonies, those things that everybody would say, well, that is a state's prison offense; and the

misdemeanors were little, small, minor violations, peccadilloes. Today, however, our statutes are in a vastly different state of affairs. The line of demarcation between a misdemeanor and a felony is sometimes as thin as a penny. For example, if I stole \$200 out of somebody's cash register, I would be guilty of petty theft with a maximum penalty of six months in the county jail. If, however, I stole \$200 and one penny, I would be guilty of grand theft with a possible term of ten years in state prison.

Child molestation, 746(a) of the Penal Code. The line of demarcation there between a misdemeanor child molestation and a felony child molestation is extremely narrow. I think it is not at all unreasonable to assume that if we find a man molesting a child, that there is a strong probability that he has done it before and a fair probability that he has been arrested for it before. Also, it may be that the act of molestation which occurred would also violate Section 288, which is a definite felony. We have a number of situations in which that occurs. If you want a narcotic illustration, you have a person who is walking down the street with all the indications that he is under the influence of narcotics. If the officer sees him in that condition, he can arrest him. That is probable cause. The offense is committed in his presence. But, if he has reliable information that Mr. "X" is a narcotic addict, there is no way in which he can make an arrest without a warrant. And, of course, the cases when you have to get a warrant may allow the individual to escape.

I think that in these sex offense cases, in the theft cases, and in the narcotic cases, the same right should be given to an officer to arrest, even though the offense is not committed in his

presence, as is accorded in felony cases. Take, for example, a good reason why. A school teacher observes a man at the edge of the school yard obviously molesting a child. She calls a police officer. The police officer arrives there. He cannot arrest for a misdemeanor because it was not committed in his presence. He has all the probable cause in the world here, the absolutely believable school teacher telling him just what occurred. Of course, somebody may say, well, of course, he could tell her to make a citizen's arrest and then turn the prisoner over to him, but I doubt whether he could persuade the teacher to do it. I think he should be given that right.

Now, the law, as it presently is phrased, allows an officer to arrest in felony cases when the person arrested has, in fact, committed a felony, though not in his presence; when a felony has, in fact, been committed and he has reasonable cause to believe that the person arrested is the person who committed it, upon a charge, upon reasonable cause - and that means upon what is fairly reliable information - of the commission of the felony by the party arrested, and at night his powers are even broader in felony cases. He can arrest if he has reasonable cause to believe that a felony has been committed, that the person arrested has committed it, even though it turns out in the end that no felony is committed at all. I think those powers should be extended to include misdemeanor arrest, in narcotics cases, child molestation cases, and in theft cases.

Now, as to your search law, there is another - well, let me get this wire tapping and dictagraph installation first, and we will

get rid of that. I think every person will agree that there are situations in which the interests of society and the rights of society are so paramount to the mere privilege of an individual, that it would not be an unreasonable search and seizure to use a dictagraph or wire tapping. We must bear in mind that our Constitution, both State and Federal, does not say that searches and seizures without a search warrant are illegal; it says that unreasonable searches and seizures are illegal. Now, if we had reliable information that a bunch of fellows constituting Murder, Inc. had planted themselves down here at 7th and Broadway in an office, and there were considerable goings on there, we knew that they were gangsters, and we got information that they were planning a series of robberies or the disseminating of narcotics, it seems to me that upon a proper showing, we could use procedure analogous to and similar to search warrant procedure, and the same in the case of wire tapping.

I have been on the police side of the fence for quite a while. I was instructor in our police school here for quite a number of years, and I appreciate their situation. I appreciate that they and the district attorneys would like to have the privilege of having the heads of those departments authorize installations of dictagraphs or wire tapping. I think it would be better for them and better in the interests of the cause of justice if the provisions for authority to wire tap or plant a dictagraph were vested in a court upon a procedure, in other words, having an affidavit filed showing there was probable cause to believe that certain activities were going on in a certain place, and a showing that it was reasonably necessary to use the wire tapping or dictagraph techniques.

Now, on the search upon arrest. We have an obsolete provision, Section 846, which authorizes a person, the arresting officer, or the person making the arrest, to remove from the person, the prisoner, all offensive weapons, and then goes ahead and requires that the property be delivered to the magistrate. Well, there may have been some reason some years ago why that should be done that way; if there was, I have never heard what it is. But in the days of modern ballistics, and the importance of having that gun examined by the ballistic expert of the police department, or if they do not have one, sending it to the F.B.I. for an examination, I think or suggest that a change should be made deleting that portion about the delivery to the magistrate. As a matter of fact, I do not believe the guns that are taken from prisoners are delivered to the magistrate once in ten thousand times. We have violated the law constantly, and nobody has asked us to comply with it.

The law is not as definite as it might be as to what can be done with property found on the defendant. Now, in actual practice, as you probably know, property taken from the defendant, except such things as he may directly personally need, are removed from a prisoner and put in the property room and kept there after giving him a receipt. That is not as clearly authorized as it might be, and I think it should be more clearly authorized by a provision amending this particular statute.

Now, nobody has said anything yet, except inferentially, about self-incrimination and the Fifth Amendment proposition, but that is so close to search and seizure that unless you stop me, I am going to make a few remarks on the subject. We now have in California a Section 1324 of the Penal Code which provides a means of obtaining

the testimony of an unwilling witness who raises the objection of self-incrimination, but it is limited to cases of dueling! Now that is very important. We have just loads of duels here, you know; they are constantly dueling all over the place - a violation of the Elections Code. Well, I have only been around our courts here for thrity-eight and a half years and I haven't run across one of those yet in which somebody refused to testify. The Military and Veterans Code, narcotics offenses of felony grade, and abortion, in all of those cases, if we have a witness who might refuse to incriminate himself, the district attorney can request of the court in writing that the procedure be initiated, and the court may then order the witness to testify. If the witness testifies, he has immunity for anything to which he may have given testimony. If he refuses to testify, he is guilty of contempt of court and can be punished; if he commits perjury, of course, he can be prosecuted for perjury. I think the statute should be amended to provide this procedure in all felony cases.

Now, I am going to ask permission of Mr. Smith to make a suggestion to this committee, and I think it is because of my interest and I believe his interest, I would like to mention it, and that is in regard to a proposed amendment to Section 182 of the Penal Code on the subject of conspiracy. I tried a case about a year and a half or two years ago in which there was a conspiracy within this county to commit abortions. This conspiracy was interpreted by our Supreme Court as a conspiracy to commit abortions by transporting the women down into Mexico, where they were actually aborted - and we had some four or five women who actually went through that horrible experience under most unsanitary conditions.

Subdivision I of our conspiracy law, coupled with the definition, in effect provides that it is unlawful for any two or more persons to conspire to commit any crime. Now, in my English dictionary, any crime means any crime, and apparently would include any crime, whether the crime was proposed to be committed within the State or outside of the State, but the Supreme Court very frequently disagrees with me and they did in this instance. They said that you cannot prosecute a conspiracy if the object of the crime is to be consummated outside of the State. In other words, Murder, Inc. could locate here, enter into a conspiracy to commit murders for a price, provided they were not committed in California, and they would be absolutely immune under our California statute. My suggestion, I put it in my memorandum, is that Subdivision I of that Section be amended to provide not only conspiracy to commit any crime, but to read, "to commit any crime against the laws of this State, or of the United States, or of any other state or of any foreign country."

Now, gentlemen, if you have any questions, I will try to answer them.

SMITH: Are there any questions of Judge Fricke? Mr. Allen.

ALLEN: Judge, do you favor a statute such as I read earlier to repeal the rule of the Cahan case?

FRICKE: I did not catch your question.

ALLEN: Do you favor a statute to reverse the rule of the Cahan case?

FRICKE: I am inclined to say no, I am not in favor at the present time. Now, everybody got very hot and bothered about the Cahan case when it came down. We have to remember, and it is

typical of all Appellate Court decisions, that when the judges write an opinion, they write it in view of the particular facts in this case. When an opinion includes generalities, and unfortunately the Cahan case did, it makes you wonder just how broad the case is, how far that court is going to go with questions that have some similarity to the question. Now, for example, in the Cahan case, and I have the very highest admiration for Justice Traynor, I think he is a most able man, he unfortunately used the expression that "those decisions" - referring to the old decisions depending on People v. Le Doux or People v. Moyen, "are hereby overruled." In other words, by a sweep of the pen, he wiped out all of the decisions which referred to or depended upon the Moyen case. Well, now, one of those cases was a case in which a burglar was lawfully arrested. They found on his person a bunch of passkeys, a large bunch of passkeys, and the loot! Now, of course, under the old law there is no question about that being admissible, but for some reason or other, the justice of the District Court of Appeals cited People v. Moyen, so that case was automatically overruled by that sweeping decision of our Supreme Court.

The recent decisions of the Supreme Court of this State have shown that where the arrest is lawful, a search of the prisoner then and there is lawful; and as I mentioned a minute ago, even the search of his automobile is lawful. I believe, and I know all of the justices of our Supreme Court personally, that they are in favor of law enforcement. I do not believe they have any idea of trying to hamstring justice. And I think that we are going to get a body of decisions from that Supreme Court that are going to be reasonably satisfactory. Now, we have an illustration that came

down - handed down the other day. It is not yet in printed form, but I was fortunate to get an advanced copy of the decision. I think some of you remember that a few years ago, some four years ago, I think it was, in the case of People v. McNabb, some revenue agents had arrested a couple of moonshiners for murder. They kept them for three days at the end of which they secured a confession. They did not take them before the United States Commissioner for arraignment until after they got the confession. Now, Mr. Justice Frankfurter, writing the opinion, held that the evidence of the confession was inadmissible. Now, he placed it on the ground that the defendant had not been promptly arraigned before a magistrate. It would have been more logical, I think, if he had said that the facts would warrant the inference that the confession was involuntary, but he did not say that. There is also a peculiarity in that case, as he cited as his authority the case of People v. Lisenba, better known as "Rattlesnake James," a case that I tried, in which they held that in spite of the fact that they did not properly arraign the man, that the confession was admissible. However, they laid the rule down in the McNabb case that the confession would be inadmissible because of the fact that the man had not been properly arraigned. Then came along the Stroble case, which was another case I tried, in which a little girl was murdered. Stroble was not taken immediately before a magistrate; he was taken to a psychiatrist first, then he was taken to the District Attorney's office where he made a confession about an hour long. Our State Supreme Court held the confession inadmissible. They took it to the United States Supreme Court and they held it was admissible. The Supreme Court has now come down and laid down the rule that

the delay in failure to arraign the defendant promptly after arrest is not ground for excluding a confession otherwise admissible. So, I think our Supreme Court is softening up a little.

ALLEN: Do you remember the case that Mr. Lynch mentioned of the body behind the door? Have you got any suggestions on that?

FRICKE: Well, I want to say this. Anytime somebody relates to you the facts of his pet case, I would like to cross-examine the fellow and find out what the facts are, particularly the facts that are not disclosed. Now, if we take an abstract situation - as I understood, there was blood there and indications that there had been some violent crime in which blood was shed - therefore, the officer had probable cause to believe that a crime had been committed by someone. If I understood his facts correctly, they eventually arrested the man who had committed the homicide, and, as has already been mentioned previously, a search is legal even though it is made before the arrest if the arrest is on probable cause. I believe the officers going in there and finding the body would be admissible evidence. I will say frankly that if it were in my court I would admit the evidence.

I think we get bothered by questions sometimes because of a lack of understanding. I think the criticism of the judge up in San Francisco, who threw a case out of court when he perhaps shouldn't, just the fact that the judge made a mistake - and after all, judges are almost human - we can make mistakes. I make them myself. That is why we have appellate courts. But one isolated instance of a judge deciding a question incorrectly, I do not think is any reason to criticise the law under which he is acting.

SMITH: Mr. McGee, do you have any questions?

McGEE: In trying to arrive at the reasonable belief, if an officer testifies that he has information which indicated the defendant possessed narcotics, how far should the court be required to go to ascertain the source of that information?

FRICKE: Well, we also have a decision on that, Mr. McGee. They had a case, also a Supreme Court decision, the name has just slipped my mind - I think it was the Martin case, but I am not too sure - in which they arrived at the situation where the officer stated that he had reasonable cause to believe that the arrested person had committed a felony. The evidence was offered and the trial court, on objection of defense counsel, ruled that they could not go into the question as to the basis of his reasonable cause, in other words, the foundation for his belief.

McGEE: The defense counsel could not cross examine . . .

FRICKE: He sustained the objection of the defense counsel. In other words, the district attorney wanted to go ahead and show why the officer had this reasonable belief, what information he had, and so forth. Defense counsel objected and the court sustained the objection, but admitted the evidence, allegedly illegally seized. The Supreme Court said that in view of the fact the defense counsel had blocked further development of the grounds of reasonableness, that the statement of the officer that he had reasonable grounds was sufficient and the evidence became admissible.

McGEE: Well, normally, the situation would be the other way where defense counsel will insist on the source of the evidence.

FRICKE: Yes.

McGEE: How far should he be permitted to develop that source?

FRICKE: You are asking my personal opinion? I think he should be required to go at great lengths, very reasonably at great lengths, within a wide degree of latitude, because our courts have also held that that question should be handled in the absence of the jury and the decision made by the court without the jury hearing the evidence. The reason for that obviously would be, naturally, the objection as to hearsay evidence might be made before a jury, but before a court, it deals with the question of reasonableness. There are many cases in which we allow hearsay evidence for the purpose of showing the state of mind of an individual. In a homicide case in which somebody urged self defense, for example, the evidence would be admissible if somebody told him that the deceased was in the habit of carrying guns, that he was a fellow who would draw a gun on the slightest provocation and shoot, and so forth. It would be hearsay information, but when it relates to the state of mind, it becomes admissible; but it might mislead a jury in one of these illegal search and seizures, though the courts have held that that examination should be in the absence of jury, and I think a wide latitude should be allowed; I would allow a wide latitude.

McGEE: But if the arresting officer were reluctant to disclose the source of a tip, would the court require that?

FRICKE: Well, the courts have already held that he would not be obliged to disclose the identity of an informer if it is a police secret.

McGEE: And the evidence can go in without requiring him to disclose that.

FRICKE: Yes.

McGEE: You tell us that the court will, and undoubtedly it will, pronounce rules for guidance, but do you think that it will do so in a relatively short time, or are we now entering a state of confusion that may continue for several years wherein the Legislature might take the lead in at least attempting to define the rules of arraignment?

FRICKE: I have already suggested some changes I think should be made legislatively, but when we get down to the simple proposition as to whether we should modify the Cahan case by legislation, as already has been mentioned, I am not sure just who it was that mentioned it right now - but Chief Justice Gibson realized the somewhat uncertain state of mind that prosecutors and police officers would have in the face of the Cahan decision, and I think it was Attorney General Brown who took the matter up with him, and he agreed - that is Chief Justice Gibson agreed - that he would transfer to his court from the District Court of Appeals cases normally belonging in the District Court of Appeals and get an immediate Supreme Court decision. I think they have done pretty well in a short space of time. You see the Cahan decision is only about nine months old and we have a number of very good decisions.

McGEE: That's all, Mr. Chairman.

ALLEN: Mr. Chairman?

SMITH: Yes, Mr. Allen?

ALLEN: This examination during the trial into the reasonable cause of the officer to make the arrest - the case like we had on the film this morning - you necessarily disclose during the course of that who the informant was.

FRICKE: Not necessarily. Our courts have already held, based upon what we call the State Secret Rule, when it is in the interests of society that information be withheld by a public official, that information may be withheld, and as far as an informer is concerned, the identity of an informer need not be disclosed.

SMITH: May I ask you one question, Judge? Maybe you shouldn't answer this. I don't know.

FRICKE: I can answer any question.

SMITH: The case is probably pending, the one in Beverly Hills three or four weeks ago where the alert officer saw a license plate turned up in the back a little bit and he stopped the car and proceeded to search and then found the money. Then he heard over the radio that a robbery had been committed and a lady had been robbed. Where do we stand on that now?

FRICKE: Well, in the first place, the officers had probable cause to stop the individual. I am not familiar with the facts of the case, but where you find a violation of the Vehicle Code provision in regard to license plates, they could have made an arrest for the violation of the Vehicle Code.

SMITH: Yes, but that is a simple misdemeanor, and if they arrest you for speeding, do they have a right to come out and search your car and tear it apart? Now is it reasonable to do that?

FRICKE: I think if they have nothing except the speeding, no.

SMITH: Well, now, they just had a license plate turned up and, as I understand it, he just thought it was a little funny.

FRICKE: Well, I think the question there is as to whether it is at night, what the circumstances are; they have a right to question the individual, and his response to the questions might warrant them developing the suspicion that he had probably committed a felony.

Even the old law as to what would constitute probable cause for justifying an officer to believe that the felony had been committed was pretty broad. There is an old California case - I can't cite it now; I don't remember either the name or the volume, but it is quite early - in which a police officer was walking his beat and he heard the call, "Stop, thief! Stop, thief!" He saw two men running, and man who was in the rear was the man who was hollering "Stop, thief!" The officer ordered the first man running to stop. He didn't, and he pulled his gun and shot him. The question was whether he was justified in shooting to commit an arrest. Now, you can't justify the shooting of an individual to arrest for a misdemeanor. The Supreme Court held that he had probable cause to believe a felony had been committed.

SMITH: I think it would be well if we took a recess not to exceed ten minutes. Those of you who are here for today only and have to get back, if you will mention it to me during the recess, we will try and get you on right afterwards.

Thanks very much, Judge Fricke. We appreciate very much your coming and giving your time to us.

RECESS

SMITH: Mr. Richard E. Erwin, attorney at law, Los Angeles, California, would like to give us some sage statements. The name is spelled E-r-w-i-n. Identify the organization, please.

ERWIN: The organization is the Criminal Courts Bar Association of Los Angeles County. It is headed by Jerry Giesler. It is an organization of the criminal lawyers in this area. It doesn't have a large membership - approximately 125, I think, at this time. It has been in existence about two years.

The Bar Association is interested in this Cahan decision. It is my opinion, and the opinion, I believe, of most of us that the Cahan decision was a must. It was bound to come because of what I call the lawlessness of the law enforcement agencies. The continued violations of the laws by the officers in enforcing the laws compelled the decision, and I feel that the Supreme Court will eventually lay down enough rules of evidence - incidentally, this is strictly a rule of evidence, the Cahan case is - and the rules of evidence are controlled by the courts. I don't believe that they can be completely set out in any book form, and since they are controlled by the courts, we feel that the Supreme Court will take care of the situation.

I would like to demonstrate what I mean by the necessity of the decision. I have been personally engaged in the practice of criminal law for the last twelve or thirteen years, and I have not seen just one, I have seen dozens of instances of searches that were made like this. These are pictures that were taken out in Huntington Park of a search made by the Los Angeles Police Department of a home. In that instance, that was a narcotics case. They did find narcotics in the home, but they didn't arrest anyone that they could convict, and it wasn't on account of the Cahan case. If they had taken the time, gotten a search warrant, and been a little more thorough in their

investigation, they would have been able to convict, I think, at least three and maybe four or five people on that case, but by breaking in and coming in there too fast - and you can see what they did to tear the house up - they weren't able to get a conviction of anyone. As I say, it wasn't on account of the Cahan case; that ruling had nothing to do with the case. As far as I know, the policeman may have wanted a third party whom I didn't represent, and I understand they finally beat the case, but I have no personal knowledge as to that. But as to two other people, they didn't get a conviction.

I have another series of pictures here taken out near Alhambra, out on the edge of Los Angeles; and this only happened a matter of three days, I think, before Christmas. These were very fine people, they were not criminals. I think probably what happened is that someone who had a grudge against them and who was in jail probably informed the police officers that the man who owned the house was guilty of a robbery - I don't know what happened - but they came out and broke in. In that instance, there were three police officers from Gardena and three from Los Angeles, and I would like to submit these and show what happened in that case. In that case, they arrested three people; they held the man who owned the house in jail for two days and turned him loose; they filed on his brother, whom they arrested, and then they dismissed because they had no evidence, and the third party was also released.

In this last case, I saw the house. I took the first bunch of pictures myself. In this last case, the house was torn up much more than appears in the pictures. I didn't take those,

and they are not very good.

Regardless of what you do with the law in this case here, I feel that you should set up some kind of rules that would certainly prevent the things happening that are indicated in those pictures. In the first place, it isn't necessary in making a search to do the things that those officers did. That is strictly vandalism. In each case there, the officers took from the home a great deal of personal property, and, as far as I know, they still have it. I think they have a police sale twice a year, or once a year, where they auction that stuff off. I suppose they would get it back, in the last instance there, if they went down and asked for it. But those are the things that caused the Cahan case in the first place, and the rules that are set up now are not so much to protect the guilty people for actually society doesn't care about the guilty people. If we just knew who they were, we wouldn't need any of these rules. We are not trying to protect the guilty people. We are trying to protect the innocent people, but you can't lay down a rule that applies to one that doesn't apply to the other. For that reason, I would say that the rule laid down in the Cahan case was a good rule and that you should not pass any legislation limiting the rule. As a matter of fact, I am afraid that the Supreme Court will, over a period of time, limit the rule to the point where it doesn't do any good, and one of these days we will probably be up asking you to institute some legislation that makes the rule effective, to wit, that evidence illegally obtained shall not be admitted in courts for any purpose. I think that is the only possible way that you can keep police officers from doing the very things that

they did in those pictures, and that isn't an isolated case at all. That is something that happens just very frequently. Any criminal lawyer can tell you that. The officers will generally deny it, and I have found that criminals don't always tell me the truth, so I don't always believe everything they tell me, but when I find the same thing over and over again, I eventually begin to believe that maybe at least most of them are telling me the truth. I have run across that situation many, many times where no arrest has been made, where they had no probable cause. Of course, they did have some suspicion, I suppose.

Unfortunately, it usually happens most frequently in cases where the person is on parole. You know they had nothing to arrest him on, he has committed no offense that they can prove - I suppose they always suspect them. They go to a parolee's house and they will tear it up three times as bad as they will anyone else's house. I think the reason they do so is that they feel safe, that after all a paroled felon, ex-convict, probably wouldn't be able to sue and get money out of them, or there would be no other remedy for him, so they proceed to take the house apart. For that reason, I feel that you should provide some extreme penalty or some manner of recovering damages for people who have had their homes unlawfully invaded and damaged, and be sure that the public in general is protected and not take away this protection of the public for the purpose of catching a few criminals.

I think that is about all I have to say, gentlemen.

SMITH: Mr. Erwin, give me a little more information. I have been a lawyer here for some twenty years. I don't know about this Criminal Courts Bar Association. How many members do you have?

ERWIN: We have some where between 100 and 125.

SMITH: Between 100 and 125.

ERWIN: It has only been in existence two years.

SMITH: You mentioned Jerry Giesler. I know him. Who else is in your organization?

ERWIN: Well, Morris Levine, Henry Huntington, Al Matthews, Mike Sullivan. You just name any lawyer in town who practices criminal law, and I think you will find that he is a member of our association.

SMITH: We all practice criminal law once in a while, and I think there are a lot more than 150 attorneys in Los Angeles. You sound awfully bitter to me towards law enforcement officers.

ERWIN: No, I am not.

SMITH: Let me tie a few of these things down. Now, you have shown some pictures here in a specific case. Can you make any distinction between if a man has committed a crime and there should be a search - or let's assume he has a search warrant. Now, you have complained here that there was practically vandalism on the part of the officers. Let's assume an individual has committed a crime. You know it; you are looking for him; you get a search warrant to go through the house. Now, are we just going to have a nice, pretty little search of opening doors, or do you say that he shouldn't be allowed to go through, or what?

ERWIN: I say that he should be able to go through and search, but I will tell you this, that a good police officer can go through anybody's home and can find anything in it, and you can come back and look and you will never know he has been there.

SMITH: Have you ever searched a home?

ERWIN: No, sir.

SMITH: Have you ever been a police officer?

ERWIN: I have gone to homes where police have searched, and I didn't know that they had searched, and they found things that were hidden - for instance, I can give them to you . . .

SMITH: Well, let me ask you this. Let's assume that you are a police officer and you are advised that so-and-so has some heroin - enough to fill up a match box, or whatever amount we want to get - and it is in their automobile. How would you search that automobile? I have asked a lot of law enforcement officers this question, agents from the Bureau. Now, what would you do?

ERWIN: Well, I am not trained as a police officer, but I am quite certain that even searching an automobile, that it can be searched without tearing it all up, although maybe not in an automobile, but I am sure the home can.

SMITH: Suppose it is in the inner tube?

ERWIN: I say I don't know how to search an automobile. I am not trained in that . . .

SMITH: By the way, I want this report to show that these pictures that you sent are made in isolated instances, and I don't want anybody to be prejudiced by it because I, personally, and Ross Miller caught John Henley Seedland, the Ross kidnapper, in Chicago. We caught him at Santa Anita race track. We got back some \$50,000, but we had to strip that automobile all night long to find it. It was under the upholstery; it was glued under the frame, in the tires, and every where else. Now, we couldn't do any sweet little job of search and seizure on that car. We took it apart bolt by bolt to find it. We picked him up at Santa

Anita; he had cashed a hot bill before, and that is all the reasonable grounds we had. That was Friday, and it wasn't until Tuesday night that he confessed. Now, we had him in the office all the time. Now, you say we are wrong in that where he killed Ross and killed his partner Gray? How about that?

ERWIN: Let's assume just one point further. Because at the time you picked him up all you had was he had a counterfeit bill, which I might have had . . .

SMITH: No, it wasn't a counterfeit bill.

ERWIN: Or he cashed one, I thought you said.

SMITH: It was a bill that we knew the serial number from the list; it was one of the kidnapping bills.

ERWIN: Now, I might have had one of them and you might have done the same thing to me, and I might not have been guilty.

SMITH: That's right.

ERWIN: And I would have felt very unhappy about it, I will guarantee you, and so would you.

SMITH: Of course, we found more money on him when we searched him. Then we took him out to the car and we had more probable cause.

ERWIN: Having very little probable cause, I think that it has to be worked down to a point it, and it is now - the Court has done pretty well - to where you have reasonable probable cause. You can't, just on a suspicion, go in and search a house like they did that second instance there. They had no probable cause at all because they didn't file a complaint on the man.

SMITH: Well, I will bet you that if it were your child that were kidnapped and murdered, you would be the first one in here

squawking at us to go out and catch this guy that we caught.

ERWIN: Well, I have that put to me all the time, but we have to remember that there is an entire public besides me. Of course I might be real hot myself, but there are a whole lot of other people that do not need to be inconvenienced or have their rights trampled on for the purpose of catching this one man, particularly when it isn't necessary. It isn't necessary to go through a house like those, I am sure of that. I remember one instance where a man sent me from the jail over to a hotel room to get some money. He gave me a note to the hotel that said this is my lawyer, let him go in my room and take anything he wants. He had told me "My money is hidden; look under the bottom of a drawer - you pull out the drawer, the third one down and you reach up under there, and there's my money, \$400". So I went over there and got the hotel manager, and we went up and pulled out the drawer and there wasn't any money there. I wanted a witness because I was afraid that these honest people we have to deal with might say I got his money. I went back to the jail, and two officers came in from the narcotics squad and they were talking to him. So I went over and talked to them and they had the money. They had been up there and had searched that place, but there wasn't a hair turned on it, and they must have made a good search because they found it down there. They must have searched everything carefully, and it wasn't all torn up that way.

Now, assuming that they do make a mistake and get into the wrong house once in a while, I don't think people would be so unhappy about it if they would do it reasonably. But to go through and tear a house up like they did in these two instances, it

amounts to just what I said - it amounts to vandalism because they don't have to do it. And those are the things, the extreme cases either way, that caused this Cahan case to be necessary. Of course, you could make an extreme case the other way that would cause the Cahan case to sound ridiculous, I am sure of that, but I think we have to go by a norm.

SMITH: Now you mentioned something to me that you particularly wanted to mention - if any of the members wanted to attend some meeting tonight where Judge Traynor is going to talk, or something?

ERWIN: You have expressed a curiosity about our Criminal Courts Bar Association, and tonight we are having as a guest speaker Justice Carter of the Supreme Court, who is going to discuss the Cahan case and search and seizure. I would like to extend to each one of you members of the committee an invitation to be out guest there. We assure you that we will have good steaks and a good dinner, and we will have a good program. Since you are interested in this question of search and seizure, perhaps Justice Carter might enlighten you some.

SMITH: Thank you very much, Mr. Erwin.

McGEE: One question. You are not trying to give the impression here that the pictures you have shown us is a policy of the policy department by any means, are you?

ERWIN: I wish I knew. I have run across dozens of cases of it, and every lawyer in the business has.

McGEE: It could be attributed to over zealousness on the part of some officer, but certainly that wouldn't be any sanction by the police department.

ERWIN: Well, there were six police officers involved in

this last case; three of them were from Gardena and three of them were from Los Angeles. In the first case, I think there were about five police officers involved. They went out of Los Angeles into Huntington Park. In most cases where I have had it occur, it seems to me there has always been a little variation of jurisdiction there, like where police officers from out of town come in here, or these officers go out of town, or something, but lots of times it is just regular officers. I have seen them go in and just pull everything out of the drawers and throw it out on the floor, pull all of the dishes and cooking utensils out from the kitchen and leave them all in the middle of the floor, break open trunks, and really do damage around the place and walk off and, thank, you, we didn't find what we are looking for, and that is the end of it. There is no remedy against it. That is exactly the reason for this decision; that is what made it necessary. I sure wouldn't want one to come in my house and do that. I don't think you would want him to come into yours.

McGEE: Isn't there civil remedy for that?

ERWIN: Yes, you can sue the police officers, but a lot of these people are ex-convicts, and I don't know what an ex-convict would get out of it except that he would be back in jail, probably, before the civil case came up. If it wasn't that, at least no jury would give him any damages. They are always subject to suspicion. I don't think an ex-convict has any civil remedy that he can afford.

SMITH: All right, Mr. Erwin. Thank you, sir.

Anybody here who has to leave tonight. Walter, do you want to talk now? Brad Crittenden? Are you ready, Walter. One of

the two of you come on up. We will get both of you in here before we adjourn if we can. We have a long program tomorrow.

This is Mr. Walter R. Creighton, Chief of the Bureau of Narcotic Enforcement, Attorney General's office, State of California. Go right ahead, Walter. We are glad to see you.

CREIGHTON: Gentlemen and members of the committee, I want to thank you for the invitation to appear. I do feel, however, that this is more of a matter for the legal brains to decide than an enforcement officer. I have been very much impressed by the statements of several of the previous witnesses, and I think there has been very constructive material introduced. We in the Narcotic Bureau have, of course, suffered to some extent because of the exclusionary rule. Cases are more difficult to make; they are more expensive to make. Following the handing down of the Cahan decision by the Supreme Court, there was a drought in cases in the State of California for at least two months, possibly three, and possession cases have been unheard of, to some degree, ever since.

I have leaned a great deal on the office of the Attorney General for advice in instructing the personnel of the Bureau, and only yesterday I learned from one of the deputies - I was very much interested in the search and seizure rules and the pamphlet on arrest and search and seizure which was introduced or put out by the Attorney General - I think I gave you, Mr. Smith, a few copies of those to hand out to the members of your committee. I learned from this deputy that some of the 20-odd cases that are, at least, in the hands of the Supreme Court at the present time, seven decisions have been handed down, five of them quite favorable, however, which is, to say the least, quite encouraging.

There is a question in my mind whether now is the time to introduce legislation to facilitate the better enforcement of the narcotic laws, or laws in general, in the State of California. Possession cases, as I said before, are unheard of at the present time; and they were, at one time, the backbone of narcotic law enforcement. It was not at all unusual to close a possession case within a short period of time, and now, to develop the same material, the same evidence, it costs the State of California quite a bit of money and requires a considerable length of time.

I have been in a position to note, having the entire area of the State of California to look to, the differences of opinion in the courts and in the offices of the district attorneys, and I do feel that it would be well if some coordination relative to criminal matters, and particularly narcotic cases, could be arrived at by the various courts in the 58 counties of our State. Also, in many of the counties, the district attorneys are hesitant for one reason or other; possibly they do not understand or they are a little fearful of stepping on the toes of the Supreme Court. I know that this is the condition, because in certain counties we can get a search warrant or an arrest warrant very simply where in other counties they are refused entirely. I do feel that there is need of legislation, particularly along the lines of search and seizure. I feel, definitely, that there should be some law provided to allow the search of the abode of an individual who has been arrested and when there is no time to procure a search warrant; the man could be taken to his home and a search made following a legal arrest. I do feel that that would, to a great extent, relieve the peace officers of the State.

As I said before, this is a matter for the legal brains to thrash out, and it is possibly a little bit unusual to have a peace officer presenting his ideas here. I do say that our hands are more or less tied as far as possession cases are concerned. We are in the process now of developing, and have developed, many cases of sale of narcotic drugs. I do hope that the time will come when we will have some legislation that will, to some degree, facilitate the enforcement of the narcotic laws.

I believe that is about all I have to say, Mr. Smith.

SMITH: Thank you, Walter. Any questions of the committee?

BRADY: Just one.

SMITH. Mr. Brady.

BRADY: Are you getting, at the present time, or are there approximately as many cases being tried or are you pursuing approximately as many now after that two or three month drought you spoke of?

CREIGHTON: We are up to about normal in the bureau in the number of cases per month; however, they are a different type of case and they require much more effort, a great deal longer time, and cost about three times as much to operate.

BRADY: Well, thank you very much.

ALLEN: Mr. Chairman?

SMITH: Mr. Allen?

ALLEN: Do you still get as many cases of the same types, for example, cases of prosecuting peddlers, as you had before?

CREIGHTON: We are dwelling particularly on peddler cases, of course. As I said before, it does cost money to make a peddler case. We were able to make possession cases as we were heretofore,

there is no doubt that much contraband drug could be picked up on information, were we able to stop certain individuals or stop cars. We have been in the habit, of course, of stopping persons transporting narcotics from various points throughout the State. However, our hands are tied as far as that is concerned.

ALLEN: You mean you don't do that now whereas you used to?

CREIGHTON: We used to do that. It was responsible for the seizure of large quantities of drugs without too much effort.

ALLEN: Well, in what way? Can you give us an example?

CREIGHTON: For instance, we would have definite information that a car might be traveling north, a description of the car would be given in Imperial Valley, and the men would be staked out in the vicinity. The car would approach and pass and be followed. Either a road block might be set up or they would overtake him. The information, of course, would have to be weighed. It was generally good. We made many, many cases of possession on information that we cannot make now.

ALLEN: You don't get any of those now?

CREIGHTON: Very, very few.

ALLEN: Well, what do you do now when you get this same information about a car, or a black Buick going north?

CREIGHTON: We take that information to the district attorney if we have time. Now, the time is limited in apprehending narcotic violators, and very often the time does not permit a search warrant or a warrant of arrest, and even if it does, the information may not be sufficient to obtain such a warrant.

ALLEN: Well, what do you do? Do you just let the car go?

CREIGHTON: Oh, yes. We cannot stop it. We have to let it go.

ALLEN: So there is undoubtedly traffic going on in narcotics now at the present time that you don't even try to stop.

CREIGHTON: Considerably more than there has heretofore, because the individual who is inclined in that type of law violation feels secure in his home. He feels very secure even in his automobile.

ALLEN: And you don't know what the extent of that traffic is at the present time because you don't apprehend those people?

CREIGHTON: That is correct.

ALLEN: Have you had any step-up in your apprehensions of peddlers to offset that?

CREIGHTON: Well, we have dwelt, to a great degree, on the apprehending of individuals by purchasing - making several purchases from them - and then effecting the arrest, either at the time of the last purchase or a warrant of arrest.

ALLEN: Well, do you feel that that work you are doing meets the narcotics traffic?

CREIGHTON: No, I do not. I do feel that possession cases, as I said before, were more or less the backbone of enforcement. Where we knew a man was a violator and drug user, we would stop him on the street, examine him and search him. Possibly he would have had a record before.

ALLEN: You mean, even without being informed a man had narcotics in his possession at that time and date, you would stop and search him and pick up cases that way?

CREIGHTON: That's right.

ALLEN: And you don't do that now?

CREIGHTON: Oh, no. We are not permitted to.

ALLEN: Well, would you say that the backbone of your program has been removed then?

CREIGHTON: Well, we are formulating another plan of attack; however, it is in its infancy now. The buying enforcement, or the purchasing of narcotics in enforcement, has always been practiced and it does actually make a more substantial case. However, we eliminated much of the traffic by being in a position to stop and seize, where we had good information, evidence that we would not have to waste the time developing a case against anyone.

ALLEN: But I should think these people would be a lot more wary about making sales to your agents.

CREIGHTON: Well, you will have an agent who can make a buy; he will eventually wear himself out. That means we have to develop another agent that is able to do that, and one agent after another is finally used up. There is an end to the process, and a man, as it is termed, can become very quickly burned out. We have to depend on these buyers, either agents themselves, or persons working under contract, and we have to depend on them. Should they become too well known, they are useless to us.

McGEE: I have one.

SMITH: Mr. McGee.

McGEE: Why don't you just make the arrest in order to get possession of the narcotics?

CREIGHTON: We are not permitted under the Cahan decision to make an arrest. We have to have probable cause.

McGEE: I understand. Take the car situation coming up from Imperial. You do follow, stop the car, and make your arrest, and you find it in the car. Certainly, then, you don't turn that

narcotic back to him after there has been a determination that you did not have probable cause. Don't the police officers keep the narcotics they have discovered even though the case may be thrown out?

CREIGHTON: Oh, definitely, yes. They are surrendered to the State for destruction.

McGEE: But the instance you cited would not be probable cause, in your opinion, for an arrest on the highway?

CREIGHTON: That is correct.

McGEE: Has there been a great increase in the number of cases, since the Cahan case, where an arrest was made but was thrown out or failed to be prosecuted by the courts? In other words, were the police, having arrested, in possession cases primarily - my point is, has there been an increase in that type situation since the Cahan case?

CREIGHTON: Oh, yes.

McGEE: Where many, many arrests are made but there is a failure to file.

CREIGHTON: Failure to file or cases being dismissed after being reviewed by the lower court, or even the upper court.

O'CONNELL: Mr. Chairman?

SMITH: Mr. O'Connell.

O'CONNELL: I thought Mr. McGee was going to take my question away from me, but going back to that Imperial Valley automobile again, I understood, when you posed the example, that you said you had some information from some source that that car was carrying some narcotics. Is that right?

CREIGHTON: That is right.

O'CONNELL: Well, then, you have reasonable cause to make an arrest, don't you?

CREIGHTON: It depends on the source of information, of course.

O'CONNELL: Well, were you in the habit before of stopping any car, owned or operated by a known user or peddler?

CREIGHTON: Very often, yes.

O'CONNELL: Those are the situations that you are prevented from repeating now because of the Cahan rule, but you wouldn't be prevented from stopping an automobile without a warrant where you didn't have time to get one, at any rate, where you had a reliable source of information that the car was, in fact, carrying narcotics.

CREIGHTON: It would have to be very reliable, of course.

O'CONNELL: Well, how reliable would it have to be?

CREIGHTON: Well, information conveyed to us from another peace officer, for instance.

O'CONNELL: Well, how about an informer?

CREIGHTON: Depending upon the informer, the reliability of the informer. If it is an informer that has been found to be reliable in developing cases in the past, I would say yes it was quite likely our case would be upheld. However, if the information that is given to us by an informer who has not in the past developed anything productive, or maybe it is the first time we have had any contact with the man, then, it would be rather dangerous to proceed.

O'CONNELL: What do you do with the automobile where your conviction won't stand? Do you have to give it back to the owner?

CREIGHTON: That is a matter that has brought up considerable

controversy. The ruling in the Cahan case was definitely on a criminal action. Our law provides that cars be seized for transportation of narcotics and you are familiar with that. We have had the Cahan case applied in many civil matters, that is civil matters of the car that we are referring to, and the cases have been dismissed. We have had that in Los Angeles County and we have had it in San Francisco and Alameda Counties also.

O'CONNELL: Do the courts rely on the Cahan case for doing that?

CREIGHTON: Yes, they have. I don't think that the Supreme Court's decision, that is the Supreme Court itself, had civil matters in mind; however, that is one thing I was referring to when I said that the courts could be coordinated throughout the State to understand the ruling a little better than they have to date.

O'CONNELL: Has the Attorney General ever appealed a dismissal of a civil action involving an automobile?

CREIGHTON: Well, I don't know. I am not familiar with whether he has or not.

ALLEN: Mr. Chairman?

SMITH: Mr. Allen?

ALLEN: How does your number of automobiles seized at the present time compare with the rate before the Cahan decision?

CREIGHTON: Oh, we have about as many, I think, possibly a little bit more. There has been considerable activity in the seizure of automobiles, and in those cases where sale cases have been made, there is usually a car involved. We are running pretty heavy on automobile seizures regardless of the Cahan case; however, the State is not retaining as many cars percentagewise.

ALLEN: Thank you.

CHAIRMAN SMITH: Walter, there have been some articles in the papers lately indicating they think the narcotic traffic is increasing in the State of California. What is your opinion of that or can you give it to us?

CREIGHTON: Well, Senator Daniels has pointed out - or it is my understanding he has pointed out - on his return to Washington that one of the two states having the greatest problem in narcotic enforcement is California. It seems he arrived at that conclusion because of the number of cases, I understand, that were made. California does have a greater enforcement potentiality, we might say. Every police department in the State of California, every sheriff's office, every law enforcement agency is more or less narcotic law violation-minded, and because of that, there have been considerably more arrests than in any other state in the Union, with the possible exception of New York. That doesn't necessarily say that California has the greatest problem because we make the most arrests. There are some states in the Union that only have one or two enforcement officers or a small delegation from the Federal Narcotic Bureau. California is all out to enforce the narcotic laws, from the smallest police department to the Federal Bureau itself, and the indications are, of course, from the figures following those arrests, that we have the greatest problem here; not that we have the least problem, by any means, but nevertheless, the figures that were obtained by law enforcement have more or less backfired on California and indicated very definitely that the greatest problem exists here in California, possibly with the exception of New York, where he is arriving

at that conclusion from the number of arrests that have been made.

SMITH: Well, don't you think it is just as logical and would follow that if we are making a lot of arrests we are doing a good job and putting a stop to it rather than not making any arrests and letting them go ahead and carry on trade?

CREIGHTON: That is what I am driving at. That is just what the Attorney General himself pointed out to me. He says that evidently the figures we have produced and the enforcement that has been shown to be in operation have backfired to a certain degree as far as statistical figures are concerned.

SMITH: Now, some of these states waive this exclusionary rule, I think, in at least the Deadly Weapon Act and possibly narcotics. Do you think that if the exclusionary rule were waived by legislation action so far as it applied to narcotic cases, that it would be of benefit and do you think it would be wise?

CREIGHTON: I think it would be of benefit.

SMITH: Do you think it is the thing to do? Do you think it would help?

CREIGHTON: I would be heartily in favor of it.

SMITH: Are there any other questions? Thanks very much, Mr. Creighton.

How about you, Mr. Hederman? You will have to give me your name and spell it for the clerk.

ALBERT E. HEDERMAN: Albert E. Hederman, Jr.

SMITH: How do you spell it? H-e-d-e-r- . . .

HEDERMAN . . . m-a-n. I am a deputy district attorney in the Alameda County District Attorney's office - Frank Coakley's office.

I would first like to express Mr. Coakley's regrets at being unable to be here in view of his participation in the trial of the Abbott murder case. I would like to offer the committee, as exhibits, first of all, the address that Mr. Coakley made to the Judge's Conference during the annual meeting of the State Bar of California in San Francisco in September of last year. I have a copy of that address and I would like to offer it as an exhibit.*

I would also like to offer the Amicus Curiae brief filed in the Cahan and Berger cases, which embodies quite a bit of material and which I think the committee might find helpful.**

Now, many of the things we have to say here in a report which we would like to make to this committee have already been covered, and where I can, I will only briefly refer to those things and simply try to reiterate what was said before in brief fashion. First of all, we find that the Supreme Court in their decision has cast aside some fifty years of precedent in the State of California when they took the position that the adoption of the exclusionary rule was the only satisfactory method of securing compliance with the constitutional provisions on the part of police officers. The courts said that they had been constantly required to participate in and, in effect, condone the lawless activities of enforcement officers and that out of regard for its own dignity as an agency of justice, the court should not have such a hand in such a dirty business.

Now, Professor Barrett, in his article in the Law Review which has already been mentioned, termed these "moralistic notions",

*Exhibit No. VII

** Criminal Nos. 5670 and 5664 in the Supreme Court of the State of California

and we certainly join with him when he asks the question, "Is not the court which excludes illegally obtained evidence in order to avoid condoning the acts of the officer by the very same token condoning the illegal acts of the defendant?"

Now, it is quite apparent that in the Cahan case the court gave very little consideration to the possible adverse effects of the exclusionary rule upon law enforcement. They recognized and stated in their decision that there was a good deal of needless confusion, needless refinements, and distinctions and limitations which have accompanied the federal exclusionary rule. Nevertheless, they confidently promised to develop workable rules governing search and seizures and the issuance of warrants that would protect both the rights guaranteed by the constitutional provisions and the interests of society in the suppression of crime. In this particular field, I will have to disagree with some of the witnesses who have earlier testified. It has been nearly nine months since the Cahan decision, and we are still waiting, in my opinion, for workable rules, just as the federal authorities have been waiting in vain since 1914 for a set of workable rules under the federal rule of exclusion.

I might pause here to answer one question which was raised, or one point which was made, I believe, by one of the witnesses, Mr. Wirin, wherein he said that J. Edgar Hoover hadn't complained of the federal exclusionary rule, but I might also point out, and I believe there is a reference to the same information in Professor Barrett's article, that the federal authorities, and particularly in the field of narcotics violations, have relied most heavily on state court prosecutions in their apprehension

and prosecution of narcotic law violators. I believe Mr. Lloyd Burke, the U. S. Attorney in San Francisco, was quoted to that effect, and that certainly was the case prior to the Cahan decision. Practically every local case made by the federal narcotics enforcement agents was brought through the state court because of the difficulties of prosecution in the federal court under the federal rule of exclusion.

Since the Cahan case, the Supreme Court here in California has decided some eight or nine search and seizure cases. And again, I think I must disagree with some of the expressions here that we have begun to formulate some good rules. Many of the cases were taken over by the Supreme Court from the District Court of Appeals for the ostensible purpose of fashioning and developing some of these workable rules. I am afraid to date that we find it painfully clear in these decisions that, as Justice Edmonds said in his dissent in the Cahan case, "We cannot ascertain the nature of the rule that is being adopted". In their recent decisions, the Supreme Court, by use of the type of language that has been used in making these decisions, has failed to fashion or develop workable rules to be followed by police officers in the areas that the court has discussed thus far. I would like to cite some examples of that. In People v. Michael, one of the recent Supreme Court cases, found in 45 A.C., 776, the court discusses the matter of consent searches, which I am sure you are familiar with. It is a consent given by a defendant to go ahead and search his house or his person. In discussing that general subject, the court said as follows:

"We are not unmindful of the fact that the

appearance of four officers at the door may be a disturbing experience and that a request to enter made to a distraught or a timid woman might, under certain circumstances, carry with it an implied assertion of authority that the occupant should not be expected to resist".

I ask you, gentlemen, if that quotation from the case discussing consent searches gives us any workable rule or indeed any rule at all regarding consent searches. Must the officer ascertain whether the person he asks consent of is a timid person before he asks consent?

Similarly, in another area, the court is discussing this business of questioning persons at night. I refer to the case of People v. Simon, 45 A.C., 671. Now, I believe Judge Fricke stated that the court had given us a fine rule with regard to patting a man down for weapons, but here is what the court said:

"There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night, and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from attack with a hidden weapon, certainly a search so intensive as that made here (where the officer reached into the defendant's pocket and found a marijuana cigarette) could not be justified".

Now, I call your attention again to the language "even if it were conceded that in some circumstances", "it is possible", "would in the light of other evidence". Those things, to my way of thinking, gentlemen, do not lay down any sort of workable rule for a police officer to follow in questioning a person at night. I can't tell from this decision whether an officer is in every case justified in running his hands over a person's clothing to protect himself from a deadly weapon, or whether he is entitled to in any case. They just don't give us enough

factual information.

In still another area, the court has, in effect, practically eliminated the effect of subsection (2) of Section 836 of the Penal Code of California. In People v. Brown, 45 A.C., 666, and People v. Simon, which I just cited, and People v. Boyles, 45 A.C., 677, the court held that a search in which evidence of guilt of a felony is found cannot be utilized to justify an arrest for such a felony, and that if the arrest is therefore unlawful, the search is unreasonable. Now, I think this is a clear application which can be made to the film which we saw. In this case the officers searched and found evidence of a felony violation, possession of narcotics; but because of the fact that the search and the finding could not justify the arrest, the arrest is unlawful and therefore could not be considered that the evidence was admissible as evidence found during the course of a lawful arrest. Again, I ask whether this is a workable rule when the court has removed, to all intents and purposes, subsection (2) from the laws of arrest.

In People v. Martin, another recent case, 45 A.C., 780, the court made it very clear that it is not the violation of a particular defendant's right which renders the evidence against him admissible, but rather that the admissibility depends on the reasonableness of the search on the theory that the government should not profit by its own wrong, but how can it be said that the officers committed a wrong if no one's rights were violated? In the Martin case, if the committee will read it, you will find that the defendant in this case was arrested in an office building, I believe, right here in Los Angeles, and the situation was

such that he disclaimed to the officers any interest in the building, and there was apparently no testimony in the record with regard to the fact that he had an interest in the building, had a right in the building, or had a right of privacy with regard to the building which needed protection. But the court said, nevertheless, that it must be that somewhere in the area somebody's rights were violated, and therefore the evidence was held inadmissible.

In People v. Tarantino, 45 A.C., 617, the court has intimated, but it hasn't made clear, that Section 653(h) of the Penal Code regarding the installation of microphones - they have intimated that it is probably unconstitutional, although they haven't said so, or that at most its provisions simply protect officers making microphone installations from being prosecuted under the terms of the very section. Again, it must be asked whether the decision in Tarantino, and the Cahan case itself, has laid down any workable rules with regard to microphone evidence. And so it is with the other decisions that have been rendered thus far by the Supreme Court since the Cahan case, and so I am afraid it will be for some time to come if we are going to look to the Supreme Court to lay down and fashion the workable rules that police officers need.

If we must live with the exclusionary rule, if we must, what, then, is necessary in order that police, prosecutors, and the trial courts may have some practical guide to follow? How can rules be fashioned which will more clearly outline the limits within which an officer must work and yet which will provide for efficient law enforcement against the criminal?

It would seem that a practical and judicious approach would be to draft a comprehensive legislative program which we can expect the courts to accept and which will at the same time provide adequate weapons for law enforcement. Such a program, I might say, has long been needed, even before the advent of the Cahan case and the exclusionary rule. The adoption of the rule here in California has made imperative a modernization of the law of arrest and the law of search warrants, as well as others.

We can examine our experience in law enforcement and point out the areas where the exclusionary rule will not work in harmony with existing statutes. We can show the need for additional legislation where the exclusionary rule has left us unarmed. Our primary need is a sharpening of our most effective weapons against criminals, that is, the laws of arrest and the search warrant laws, both of which were enacted in bulk in 1872 and are now hopelessly dulled and inadequate both through age and now, particularly, through the abandonment of the non-exclusion rule. To illustrate, we have chosen some several areas here where we are finding, as a practical matter, that existing law is not adequate and will try to indicate the type of remedial legislation which appears to be needed.

First of all, it has already been indicated by several of the speakers that our search warrant law at present is hopelessly inadequate. We feel that if we are to be required in many cases to obtain search warrants, the law needs to be brought up to date, particularly in these several areas.

First, the removal of the limitations on the type of evidence which can be sought for under a search warrant. As you

have heard mentioned by many speakers, the search warrant laws now do not permit or authorize a search under a warrant for the body, or for the fingerprints, or for the clothing that a robber may have worn during the course of the commission of the robbery, or other means of identity such as that which are not the means of commission of the crime, nor the loot stolen, but may be just as important in prosecuting the case as the gun that was used or the loot which was taken.

Secondly, we need a removal of the limitations on night search warrants. Nobody thus far, I don't believe, has discussed the situation that we face now in connection with getting search warrants at night. Section 1533 of the Penal Code now requires that a search warrant to be served at night must be based on a positive allegation that the property is in the place or on the person to be searched. That means that even if you have then reliable informants giving you information with regard to the fact that a certain person was selling narcotics, or other information such as that, unless you had some positive allegation that at that time and place there were narcotics on the premises, you would not be entitled to secure and serve a search warrant at night.

There is also need for clarification of the requirements of the affidavit upon which a search warrant is based. This is a thing easily accomplished. Right now, the way the language of Sections 1525 through 1527 reads, it uses the term affidavit and deposition almost interchangeably. We spent a whole day in court in Alameda County within the last several months arguing whether or not the affidavit which the officer had submitted to the judge, upon which he based a search warrant, was adequate

of whether the term "deposition" properly covered such an affidavit. Needless argument and needless time and effort taken over a point that could very quickly be cleared up by the Legislature.

In the same area, there is also a need for eliminating or clarifying the requirement regarding a description of the property to be seized. Right now the requirement of particularly describing the property is unrealistic. Let me cite an example. If a search warrant describes three stolen articles, and the officers, in searching, find four of the articles, should not the fourth article also be recoverable or must the officer now return and draw up a new warrant, and so forth.

This has been mentioned also briefly, but we certainly need clarification of authority in this deal where officers are acting under a search warrant and are now required, under Section 1531 of the Penal Code, to give notice of their authority and purpose and to be refused admittance before the officer is entitled to make a forcible entry. There would be provision made for entry without notice where there is reasonable cause to believe commission of an offense is in progress or that the evidence will be destroyed; this is particularly applicable to narcotics cases. In narcotics cases, the officers will hear the flush of the evidence down the toilet long before they will hear the peddler inviting them in in response to their knock.

Next, we should make a clearer provision, which is not clear now in the search warrant law, that the affidavit upon which a search warrant is based may be based on hearsay information, information from a reliable informant. Right now we have

indication by the court that possibly information from an informant is enough upon which to base an arrest, but that is not what we find under the search warrant law as it stands today.

Now, the next major area that has been already discussed is this whole field of the law of arrest. This subject is already under study by several committees which are examining the Uniform Arrest Act and other possible legislation on this subject. I will not go into detail on this for that reason, but suffice to say that the work of these committees should be certainly closely integrated with any program of proposed legislation in the field of search and seizure.

Another area which has not yet been discussed is the area providing for searches incident to a lawful arrest. For example, right now under the Cahan case and their decisions following that case, we do not yet know how extensive a search may be made upon a lawful arrest. Now, it seems to me reasonable that provision should be made for the extension of a search incident to an arrest, at least to all of the premises in which a person is arrested or over which he has control. The federal cases in this area are full of needless limitations. For example, cases in both the federal and some other jurisdictions having the exclusionary rule have held that garages outside the house are not permitted to be searched even though the arrest took place in the house. This might well be further extended, particularly in narcotics cases, to a search of any premises over which the defendant exercises control. For example, if a narcotics violator is arrested on the street, it would seem certainly logical and reasonable to permit an immediate search of his room

where evidence of use or preparation of narcotics for sale is likely to be found - hypodermic outfits, milk sugar, capsules, bindles, and so forth.

Similarly, as discussed under the search warrant law, there is need for clarification as to what types of evidence may be seized under a lawful arrest. The federal cases seem to impose an illogical limitation making it doubtful if evidence of a crime other than that for which the arrest is made would be admissible. Legislation in this area could spell out the propriety of seizing evidence of any crime in a search incident to a lawful arrest.

There also should be provision to justify searches and seizures incident to a lawful arrest regardless of the time or opportunity to secure a search warrant. If you have opportunity to secure a search warrant, but nevertheless you also have reasonable cause to make an arrest on the spot, you should not have to be required to go and get a search warrant.

A short while ago it was discussed, I believe in a question by Mr. O'Connell, that the situation wherein the automobile was coming up from the Imperial Valley, enforcement officers have information that that particular automobile is carrying contraband. I cite a federal case on that subject which makes it clear that although the officers might have reason to stop and search the automobile, under the federal rule of exclusion, which we can reasonably expect to be applied here in California, the officers would not have the right to search the occupants. Now, then, in the case of narcotics, isn't it likely or logical that if the package of narcotics, being as it is of such a small nature, would be just as liable to be found on the person of

the driver of the car, the man on the back seat, as it would to be found in the trunk or elsewhere in the car? So, while the federal rule permits searching the car, it does not permit search of the occupants. I cite U.S. v. Diray, 332 U.S., 581.

There is also a question as to whether or not the officer stopping a person for a traffic violation is entitled to search the car or the occupant as an incident to that arrest. For example, if the car is being driven in an erratic manner, the officer stopping the car ought to be permitted to check the car and the driver for evidence of use of narcotics or liquor.

Getting back to another area, the subject of consent searches which has already been, to my way of thinking, unsatisfactorily discussed in People v. Michael, and also by virtue of the confusion created by the federal cases and cases from other jurisdictions, these all indicate a need for clarification in this field by legislation. For example, minority jurisdictions have frequently held that persons under arrest are incapable of giving a voluntary consent. Because of the mere fact that they are under arrest, coercion is implied from that circumstance. We certainly don't want such a rule to develop there. Perhaps legislation in this field should provide for a presumption of voluntary consent where a search is made without objection or where consent is expressly or impliedly given. The burden would thus shift to the defendant to show coercion or the involuntariness of the consent.

In another area we find that the very basis of the Cahan case is that the State should not profit by its own wrong. In the Tarantino case, the court suggested, but only slightly - they didn't spell it out - that evidence obtained by a private person

acting in a private capacity might not be held inadmissible. This should certainly be more clearly stated. It is already the rule in the federal courts that seizures by a state agency would be admissible in a federal court if there was no participation by a federal agent or agency, and, referring for a moment, Mr. Smith, to your situation where you had a sheriff with you when you made the arrest of the individual you spoke about, I can't see the point that the presence of the sheriff made it any less a federal arrest or one in which the federal authorities participated. In this State it should be clearly stated in statute form that searches and seizures made by private persons or by federal agents should be - the evidence seized thereunder - should be admissible so as to prevent the State from being penalized for errors of other agencies or errors of private persons.

In the last area I want to mention, I think that in order to eliminate a good deal of the red tape that is apparently being found in settling search and seizure questions, there is need for legislation to provide a motion to suppress evidence and to fix a time period before trial, not later than which such motion may be made, except, of course, where the facts were not known to the defendant or his counsel at that time. Legislation in this area should also limit the making of such motions to the defendant and require, as a basis for such motion, an affirmative showing by the defendant that he or his property have been subjected to unreasonable search or seizure. A procedure similar to that in federal courts might provide a basis for such legislation, although we would have to be careful in that area because we find in the federal courts a good deal of duplication. We

often find that the motion is made prior to the trial, again during trial, and again after trial on a motion for new trial, so it is argued, re-argued, hashed and rehashed time and again.

There are, no doubt, many other areas where only legislation is going to provide reasonable, workable rules that the courts spoke about. In approaching these problems there is a need for coordination and integration of proposed legislation, not simply in the field of search and seizure, but in the realms of arrest, right to bail, production of the defendant before the magistrate, and similar areas where our law presently is inadequate or outdated. For example, the Supreme Court recently raised a doubt as to the proper application of Section 825 of the Penal Code in the case of Dragna v White, 45 A.C., 492. That section requires production of a defendant before a magistrate without unnecessary delay. The court made it clear in that case that the outside limit to such delay is two days, but within that period it becomes questionable. Our routine police procedures, such as holding line-ups, contacting and questioning witnesses, and interrogating the defendant, are they or are they not unnecessary delays? We can't tell at this point.

I might also mention that Judge Philip Richards, whom I believe is scheduled to appear before the committee, has delved into a portion of this field and has made a study and a report on the subject of felony, arrest, and the right to bail.

At least some of the other areas that have been mentioned are now undergoing survey and study by other committees - Attorney General's committees, State Bar committees, and so forth. The information obtained through these studies should be summarized

and integrated into a comprehensive legislative program which can ascertain the areas where there is agreement on the need for legislation and the scope of those needs. Preliminary drafts of this program could then be prepared, thoroughly studied, reviewed, and finally presented for passage.

Now, it has already been said and mentioned by people who are in favor of the exclusionary rule that such legislation could not adequately spell out rules, and we concede that such a program could not be expected to provide, as it has already been termed, a ready litmus paper test which would cover each and every situation an officer will face; but it should provide at least a practical working approach, in the form of modern laws, to enforcement in those areas where the rules are now vague, conflicting, or even non-existent.

If we are to be required to operate under the exclusionary rule, the fact remains that without a correlated program of legislation, we are going to be without workable rules for some time to come. And without such rules, we find that the police are already hesitating to act, and when they do act, more frequently than not, they are being challenged on every technical point, all of which is resulting, as we have already seen, in the spectacle of criminals being freed despite clear and convincing evidence against them.

Now, I would like to submit a copy of the report for the committee. I would also like to briefly comment, if I may, without prolonging the session this afternoon, on a couple of things that were said by some of the other witnesses and in reply to some of the questions that committee members had.

I would like to take, first, the film that we saw. It seemed to be the opinion of a couple of people who have appeared here that an arrest in that case probably was proper and would have been justified in court, but I would like to ask those same people if, for example, they would have issued a search warrant, or could have gotten a search warrant, where the only information they had was that there was information from an informant that somebody was dealing narcotics and that a particular street had something to do with it. Now, I ask you if you could get a search warrant with that information. Even if you could get a search warrant, should the officers in that case have been required to sit on the spot until they saw the person they thought might be responsible for the narcotics situation which was described to them by the informer? Should they run back to the City Hall and get a search warrant? By the time they got back to the scene, why, of course the defendant would be gone, the narcotics that he had would be sold to these juveniles that were spoken of, the sweaters would be peddled somewhere, and they would be "out-the-window". I also ask whether or not the courts would uphold the arrest as it was made in that situation? The Brown case, which I believe was referred to, said, in effect, that it is all right to search first and arrest afterwards and was predicated on the proposition that there was reasonable grounds upon which to make an arrest, and if there is no such grounds, then you may search first and arrest afterwards. But there were no such grounds present in the situation shown in that film, the only grounds, again, being information that somebody was dealing narcotics and a certain street had something to do with it, and the officer who would go to that

street would see a person whom they had known to be a narcotic offender. Is that sufficient grounds upon which to make an arrest? Certainly we should say that it should be sufficient grounds, but under the present tenor of the decisions, I don't think it would be found to be so in the Supreme Court.

I might comment just briefly to the photographs that were offered in evidence by Mr. Erwin. One point that I noted down was the fact that he more or less tossed away the return of the property. He said "I suppose if we went down to the City Hall we could get it back", and also he apparently has demonstrated not too much faith in our jury system when he says that if the person was a parolee he wouldn't stand a chance of any civil recovery. Well, I wonder if maybe that isn't the basis for all of our troubles. Isn't the basis, perhaps, the laxity on the part of individuals in enforcing their own rights? Or maybe it is that their rights have not been so violated that they need enforcement. There has been no proof offered except a couple of photographs before this committee that there was ever any need in California for the exclusionary rule on the basis that officers were, in wholesale fashion, violating their oaths and the laws which they were bound to protect and uphold.

I think that is all I have to offer at this time, Mr. Smith.

ALLEN: I have a question.

CHAIRMAN SMITH: Mr. Allen?

ALLEN: Do you concur with the statement that was made earlier that the name of an informant could be withheld from the court during proceedings questioning the rights, or the reasonable cause, of officers to make an arrest if that is the cause on which

they make the arrest?

HEDERMAN: There is a case which has been decided within the last two to three months, People v. Gonzales, in which in a situation in Los Angeles the name of the informant was protected in the trial court proceedings. However, I would like to mention again the fact that I believe I mentioned with regard to the obtaining of search warrants. We still do not know, or have it clearly spelled out, whether a search warrant can be based on such information.

ALLEN: Thank you.

CHAIRMAN SMITH: Mr. McGee?

McGEE: Let's assume that in the movie we saw that later on the kids who burgled the store were apprehended and in that way it was established that they had stolen the sweaters and given them to this peddler for the narcotics. Are those illegally seized narcotics usable in a second charge against that man for selling, or once having been held to be illegally seized, are they forever after precluded from usage as evidence in other proceedings?

HEDERMAN: It seems to me very clear that they would be precluded from being offered as evidence.

McGEE: If they were to succeed in getting the burglars and thus implicate them in selling narcotics, they are handicapped again.

HEDERMAN: That is true. It might also mention that the sweaters would not be admissible in evidence if a case were to be brought against the thieves who stole them because they were illegally seized.

McGEE: Now, if the officers in that picture had gone back

down town and got a warrant to search the house from which he came, would that be sufficient probable cause, do you think, to suspect a sale in that house, to warrant the issuance of a warrant?

HEDERMAN: Certainly under the existing search warrant rules it would not have justified a search at night.

McGEE: The fact that he had just walked out of the house and went to the car, they stopped him, found it on him, would not justify them searching that house at night.

HEDERMAN: I misconstrued your example. You mean that the officers went ahead, found the narcotics on his person, and then sought a search warrant for the house?

McGEE: Yes.

HEDERMAN: Again, I think that there would not be adequate grounds on which to base a search warrant to be served at night for the reason that there could be no positive allegation by the officers that there were narcotics on the premises. They might get a search warrant to go back the next day on the basis of the fact that the man had come from the house and had been found to have had narcotics in his possession. However, there are federal cases which have held that the seizing of evidence in an unlawful fashion, which gives to the officers information upon which they seek to base a search warrant, cannot be utilized as a basis for obtaining that search warrant.

McGEE: That is what I am getting at. How about in our state courts? Is there any state rule on that to your knowledge?

HEDERMAN: There is none as yet, and we can only wait until some decision comes down from the Supreme Court as to what they are going to do, if anything.

McGEE: So, in that instance, maybe they would hesitate to apply for a search warrant. They might go back to the same deputy, district attorney or officer and he would turn them down on the search warrant for the same reason he was inclined to turn them down on issuing the complaint?

HEDERMAN: That's it.

McGEE: Thank you.

CHAIRMAN SMITH: Mr. O'Connell?

O'CONNELL: Yes. I would like to ask whether, in your opinion, law enforcement officers could do an efficient job without depriving anyone of his constitutional rights?

HEDERMAN: Yes, I think they can. It is just a question, I suppose, of how far a person's rights are to extend. The only searches and seizures that are limited by the constitution, or prohibited by the constitution, are unreasonable searches and seizures; so it pretty much comes down then to an interpretation, in each particular case, of whether the officers acted reasonably or unreasonably.

O'CONNELL: Do you think that evidence obtained from an unreasonable search and seizure should be admissible?

HEDERMAN: Yes, I do, very definitely.

O'CONNELL: You think, then, that although it isn't necessary to deny anybody his constitutional rights, that you would like to have the right to do it?

HEDERMAN: Well, I am not quite sure I follow your question.

O'CONNELL: I understood you to say that, in response to my first question, you thought that law enforcement officers could do an efficient job without violating anybody's constitutional

rights. Now, if a person has a constitutional right not to be subjected to an unreasonable search and seizure, then why should law enforcement officers be permitted to use the evidence obtained in such searches against that person?

HEDERMAN: Because it is not a great benefit to the law enforcement officer himself. He is achieving no great glee or satisfaction out of prosecuting another case. It is depriving society of the right to have that evidence used against the defendant who has clearly committed a crime. The officer may be subject to punishment, or may be subject to civil remedy.

O'CONNELL: Well, do I understand you, now, to say that law enforcement can't do a complete and efficient job without resorting, at times, to unreasonable searches and seizures?

HEDERMAN: Well, I wouldn't go that far, Mr. O'Connell. I would say that it probably can be done without violating a person's constitutional rights but that if, as we all make mistakes - officers do, at times, make a mistake and violate somebody's rights - that society as a whole should not be penalized for his mistake.

O'CONNELL: You wouldn't say, then, that if the Legislature should so modernize existing law with respect to arrest, searches and seizures as to make it possible for search warrants to be obtained readily for arrest to be made under certain circumstances which were clearly defined and without warrants, and so on, it would be unnecessary, then, to consider the question of whether illegally obtained evidence should be excluded or not.

HEDERMAN: I think it would eliminate, to a great degree, the necessity for officers, or the entertained necessity, to use illegal means to obtain evidence. In other words, prior to the

Cahan decision, officers were regularly stopping persons of questionable character, known narcotics peddlers, and so forth, as has been described, I believe, by Mr. Creighton, and making many, many arrests and successful prosecutions for possession of narcotics. Today the officers are not doing that because of the Cahan decision and because of a pointing up of the inadequacy of our laws of arrest. What they were doing prior to the Cahan case seems to me to have been reasonable, under all the circumstances, and yet the law of arrest did not provide for arrests in such cases. It seems to me the law should be modernized to make the arrests made in those cases permissible under the law; and, therefore, the searches made thereunder not unreasonable or illegal searches.

O'CONNELL: Going back to the film for just a final question. Maybe I misunderstood you, but I gathered that you thought that Sergeant Joe Friday and his sidekick there should have been empowered to go into these twenty homes along that street and search them for this heroin that was suspected to be there.

HEDERMAN: No. I didn't say that. I feel that they should have been empowered to do just what they did, to search the narcotics violator or known narcotics peddler, who was the subject of this information and fitted with the information given them by the informer, not that they should be empowered to go and search every house on the block.

CHAIRMAN SMITH: Thank you, very much, Mr. Hederman. We appreciate your information.

Mr. Crittenden, you are going to be here tomorrow, aren't you? We are getting tired.

CRITTENDEN: Yes, I will be here tomorrow.

SMITH: Chief Parker, can this equipment stay here tonight?
Will you have to use this place for something else?

CHIEF PARKER: No, we canceled the show-up in the morning so
that the committee will find everything in order.

CHAIRMAN SMITH: All right. We will take up at 9:00 o'clock
tomorrow morning then.

Adjournment 5:35 p.m.

January 12, 1956
9:00 a.m.

CHAIRMAN SMITH: The committee will be in order.

We have Mr. Bradford M. Crittenden, District Attorney of San Joaquin County, Stockton, California.

CRITTENDEN: Mr. Chairman, after the very, very able discussion by Mr. Al Hederman of the Alameda County District Attorney's office yesterday in regard to the law, I am not going to attempt to cover or go over the same ground except to say that I heartily endorse everything that was said in Mr. Hederman's testimony before the committee and will confine what I have to say, then, to a few remarks in regard to the practical aspects of this situation as we have found it in our county since the two decisions that have been under discussion. First, may I say that basically the court has given, as was pointed out by Professor Barrett, two reasons for their taking the action they did in the Cahan and Berger cases; one, that nothing had been done to attempt to control or discipline a lawless police agency or agencies, and second, for that reason the court was taking the action that it did. There was an implication that possibly, legislatively, prior to the time they handed down their decision, action might have been taken by the Legislature to attempt to pass laws that would control a lawless element of enforcement. Now, very frankly, I bitterly resent and I differ completely with the court's premise on its basic underlying reason as stated for the two decisions, in the two decisions. First, for a great many years, I have had a rather close relationship with the California Legislature. I

am not going to say that I feel that the Legislature has not been responsive to the wishes of the people and to the feelings of the people throughout our State. I know, to the contrary, that they have been. Secondly, I would quarrel with any implication on a broad basis that my profession, and I consider that the profession of law enforcement, is a lawless profession. I have been associated now, actively, in the prosecution field for some fifteen years, and I feel that we have a fine and an able and a sincere and an honest body of men in law enforcement throughout the State. The fact that we have erred in a few situations, I feel does not justifiably open us to a broad and sweeping condemnation as to lawlessness. The court, in so doing, I feel, has stepped beyond its judicial function and has directly attacked me and my profession, and, therefore, I feel that that accusation I must answer and have done so in the matter that I have just stated.

I think we should get into proper perspective just where we are with this matter. We have three branches of government. We have the legislative, we have the executive, and we have the judicial. The police arm of the government is a part of the executive branch of the government, and as such, there has been too much of an inclination, or too much statement setting us out in the executive or enforcement end as a separate - some entity up here who is possibly going to attempt to take over and control the government. The use of the words "police state" and that type of thing, I think, are ill-advised. We work for the people just as much as any other department or bureau or part of the government, and we are a part thereof. I would quarrel with the

court in an implication that fear of a police state may come from law enforcement itself. I would rather state, and I believe sincerely, that one of the bulwarks against a police state in this country is honest and efficient, hard-working law enforcement. So that basically in its reasons for the decisions, I differ with the court, and I feel that the premise on which they have based the decisions is an ill-advised premise and possibly one based on a lack of information in regard to the over-all picture as to law enforcement in this State.

Now, then, next, as to the result of these two decisions, and I speak primarily for my own county. We have had a confusion in our courts. The decision, as handed down, was a statement of a broad and a general principle, and there a period was placed. Nothing was said as to procedures, as to how these matters were to be raised, whether the federal motion to suppress would be the method of attempting to test these matters in our courts, nor were there any guideposts or rules laid down for the lower courts; and, as a result, we have had not only varying decisions throughout the municipal courts, but throughout the superior courts in the State, and even within the counties, from department to department, varying interpretations of exactly what the decision meant and as to what would be admissible or not admissible in a given situation.

Another very definite effect that the decision has had on law enforcement in our area has been in the matter of the morale of the officer himself. Now, in our county, we live very closely with the police officer. The men in our office ride the patrol cars, we answer every felony case that occurs within the county,

and many of the misdemeanor cases, and this has resulted in a feeling, in the officer, of insecurity. He doesn't know how to move or exactly what to do under certain situations, and, very frankly, from the capacity of the District Attorney's office, in many situations, it has been very difficult to attempt to advise him as to what particular action to take under a given set of circumstances. The guy on the beat, the man in the prowl car, in his everyday living and his everyday conduct of himself, finds it very difficult to do the job that he is sworn to do, and that is to keep the peace and to enforce the laws that have been passed by the legislative branch of the government. There are numerous examples of this that might be given. For example, just a very simply everyday situation. Mrs. Jones calls in and says that she has had a prowler, that she saw the face of a man at the window, that she heard somebody shaking the back door at one or two o'clock in the morning. The prowl car answers that call. He has no description of an individual. He sees a man walking in the particular suburban area. How far can he go to determine whether or not this man belongs in that area, whether or not he is the man who has been at the Jones house, been at the back door? The court has been of little assistance as yet, for example, in that situation. They say we have a right to talk to individuals. Has he a right at that point to actually shake down the man? Has he a right at that point to take him in, assuming, even, that the answers that he gets are not satisfactory to the officer, in order to further process him and see just exactly who he is and what he is doing in that particular area? So that, within enforcement itself, we have had difficulty in actually carrying out a concerted

and a consistent and an efficient program of enforcement following these two decisions.

Now, in our county, for example, for a period of over some sixty days following these two decisions there was no arrest made in the narcotic field by either federal, state, city, or county law enforcement officers. Since that time, our enforcement in that field has not been equal to that which obtained prior to the time of the two decisions. It has fallen off, I would say roughly, to about two-thirds. From a half to two-thirds of the number of arrests previously made are now being made in our particular county. There is no way of knowing the quantity or the amount of heroin that is in the county, but information that we have from that field indicates that the price of heroin has dropped in our area, indicating a greater supply is available than was available heretofore.

The insecurity on the part of the officer in knowing exactly what he can do, his fear of personal liability for acting wrongfully, is a factor that must be considered in the effect of the decisions as they have been rendered. I had an officer sit in my office and say "All right, you tell me what to do. I will go out and do it, but I have a home and I have two kids, and I want to know whether or not if I do it I am going to be open to civil liability as a result of the action that I have taken". These men are very cognizant, not only of the criticism of the court, but of the decisions as handed down by the court. I frankly feel that in many fields the public has been left, by this decision, unprotected. I don't know, for example, how, in an organized bookmaking operation, one can get to the hub of that particular

operation and successfully stop it if one operates completely within the law as we believe it to be from the two decisions that have been handed down.

I think from what the committee heard yesterday, and I know from that which has happened in my county, that two things have occurred as the result of the Cahan and Berger cases. One, there has been a confusion among law enforcement officers and in enforcement as to exactly how to operate within these decisions. Second, there is a confusion among the courts as to their interpretations of the law. Now, we have two ways of working this out in the long run. One is to wait until a long, slow, and arduous judicial process has, one by one, interpreted individual factual situations until possibly a pattern will develop so that law enforcement may be able to govern itself. This certainly has not obtained in the federal courts under the federal rule, and I would like to comment in regard to that. I know, for example, in my county that there were many, many federal cases made by the Federal Bureau of Narcotics and they were unable to prosecute that were brought into our courts and into my office for prosecution because of their inability to make the arrest and make the pinch under the federal rule of exclusion. I might make a comment also that we asked Mr. Burke at one time prior to the time of Cahan and Berger to appear before our law enforcement body in our county to discuss with us the possible effects of the federal rule should it ever become the law in California, and although Mr. Burke gave an excellent talk, his only comment in regard to the federal rule was "Pray God that you never get it". Well, we have gotten it and are attempting to live with it. Now

the other hope is that the Legislature will, seeing and realizing our problem that has developed therefrom, through legislative action take steps to assist in the clarification of the situation by statutes that will enable enforcement to do a good job. I frankly feel that, in commenting in regard to one of the questions that was asked yesterday, operating completely within the federal rule, or the exclusionary rule, it is most difficult, if not impossible, to do an efficient job of enforcement, particularly in certain specialized fields of the law.

I think that is all, Mr. Chairman.

CHAIRMAN SMITH: Thank you very much, Mr. Crittenden. Are there any questions? Mr. Brady.

BRADY: One thing occurs to me. You mention bookmaking. In San Francisco the day before yesterday, there was a great bookie operation knocked over. It couldn't have been impossible. Apparently the seat of the operation was taken, because the records were there for \$30,000 or \$50,000 a week, or something. A great many men were arrested in the four or five spots, the tentacles of the hub. Now, how was it possible that that job was done in San Francisco if it is impossible to do it in your county?

CRITTENDEN: I don't say that we can't make arrests in those cases, but I did say that I don't think that we can enforce it and get convictions. For example, the way bookmaking operates in our particular county, one of the centers of bookmaking will be centered in an apartment or a home. A man will sit there with a phone. The only outside contact that that man has, as a part of the operation, are calls that he receives from the bar or from

runners. You are not making a buy from you. You can't go out and actually lay down a bet with him. You may be able to get a phone number, if you are lucky, where you can get someone to phone in, but the way it has been operating, the contact of the bettor has been through a runner, and the runner is the one who phones it in. Now, under these particular decisions, in order to get a search warrant under the laws that exist at the present time, for example, where you have to allege with definiteness just the exact things you are looking for to go in, the obtaining of a search warrant is impossible. Secondly, in order to obtain a warrant of arrest, we don't feel under that situation that we are able to get enough information to lay a complaint in order to arrest a man. Now, I don't know what is going to happen in San Francisco or the basis for the arrests that they had or whether they had worked somebody into the situation or not, but the way the thing is set up and has been operating in our county, why to get that guy in the center and then move on in order to get the man behind the man, I don't see, legally, how we can do it. We can arrest them all right. We can kick the door in. We can take them and put them in jail, but we can't make it stand up.

CHAIRMAN SMITH: Mr. McGee.

McGEE: Why do you say it is impossible to get a search warrant?

CRITTENDEN: Well, for this reason. Under the law as it now exists, you must allege with definiteness what you are after. You have to describe where it is located. Now, on a bookie operation, the guy is sitting there, we will assume. This is usually the way it works - and he is writing down on a tab or on a sheet the

bets as they are being phoned in. How can we describe with particularity just what they are? I mean you can just say generally books, records and paraphernalia, but that is not sufficient under the law.

McGEE: That is not sufficient?

CRITTENDEN: No, it is not.

McGEE: You can allege the place, can't you?

CRITTENDEN: Allege the place?

McGEE: You may not be able to allege the name of the man in there . . .

CRITTENDEN: No.

McGEE: . . . but that isn't sufficient to allege the paraphernalia?

CRITTENDEN: No. A search warrant is a complete misnomer by name. Ordinarily if you have enough for a search warrant, you don't need one. You have enough for an arrest. But it is not a document by which you go out and look for something. Search is the wrong word. It is a document whereby you go out and get something that you know is already there.

McGEE: Could we help you in that respect?

CRITTENDEN: You certainly could.

McGEE: Well, by permitting a less specification?

CRITTENDEN: Yes.

McGEE: But not a generality.

CRITTENDEN: Not a complete generality, no.

McGEE: You wouldn't want us to go to the extreme of permitting you to go on a fishing expedition?

CRITTENDEN: I don't, no, and I don't think that anybody in

enforcement wants the right to walk into any man's home and go through it and turn it upside down with no basis at all.

McGEE: I am surprised that it has been held that just alleging the paraphernalia of bookmaking, sheets, papers - there is so little they need. Is that the problem, to operate . . .

CRITTENDEN: Well, you can't describe it because it changes minute by minute in that operation. Let's take another situation on your search warrant. We have had several of these. You have an operation where it is a fraudulent sales venture; possibly it involves a corporate structure or setup. You have enough information to know that it is fraudulent, and it is wrongful, that a crime has been committed. Now, you may have enough even to get a warrant of arrest for the individual involved, but you need the books to prove what you know, what you have learned from other people. They are essential. Now, in order to get the documents and the books, you have to describe them with particularity, and you can't do it because you don't know exactly what they are. You can't say receipt number so and so, document number so and so, and you can't say all books, papers, and records of the corporation that have to do with this fraudulent venture. That isn't sufficient. One of the cutest statements that was made yesterday before this committee was the statement "enlarge the powers of arrest, give them more latitude in arrest, but limit the search". Yes, let us go out and arrest people, but don't let us be able to get the evidence to prove that they are guilty. We do need help in that field.

McGEE: You would rather do it the other way. Get the evidence.

CRITTENDEN: Absolutely. There is no sense in arresting a

man if you can't get the evidence to convict him.

CHAIRMAN SMITH: Thank you very much, Brad. I certainly agree with you that Mr. Hederman gave us a very learned discussion yesterday. Now, is the District Attorney ready?

UNIDENTIFIED VOICE: He should be here any minute, sir.

CHAIRMAN SMITH: It is almost 9:30. Who else do I have in the audience who wishes to testify? Mr. Pitchess, are you going to testify for the Sheriff? How long are you going to take?

PETER J. PITCHESS: I have a short statement to read, and my guess is it will take about five minutes.

CHAIRMAN SMITH: Come forward. This is Mr. Peter J. Pitchess, Undersheriff of Los Angeles County.

PITCHESS: I shall read this statements of the Sheriff's and add a few personal comments of my own.

This Assembly Judiciary Subcommittee is performing a great public service in conducting an inquiry into the matter of illegal searches, seizures and the laws of arrest. The facts secured by this body will be of great material assistance in its deliberations and recommendations in Sacramento. I am sure that this subcommittee will be better prepared to meet its responsibility of protecting both the rights guaranteed by constitutional provisions, as well as the vital interest of the people in effectively suppressing crime.

Following the application of the exclusionary rule by the California Supreme Court, I issued the following directive to the sheriff's personnel:

"Attention is hereby called to recent rulings of the Supreme Court of California in the cases of People v. Charles H. Cahan and People v. Alfred Berger,

wherein evidence introduced by police officers was found to have been unlawfully secured. Copies of these rulings, together with copies of dissenting opinions, are being supplied to all commanding officers and unit heads. All employees of this department are admonished to note and heed the import of these decisions, especially so as they apply to normal conduct of employee's duties. Every effort will be made by operating personnel to adhere closely to a policy of securing evidence only through proper and lawful methods, and with due regard for all pertinent decisions of the United States Supreme Court, the California Supreme Court, and federal and state statutes".

Following the Cahan decision, we experienced a period of uncertainty throughout the department while we analyzed the implications in this case. First, we recognized that it was reflected in matters relating to preliminary investigations of suspicious persons and cars by the patrolling radio car deputies.

Secondly, a decrease of activity was more readily observed in arrests of illegal bookmakers and persons unlawfully in the possession of narcotic drugs.

We held conferences with our staff officers and line unit commanders wherein we attempted to develop positive courses of action which would enable us to carry on with our work. Some thirty days after the Cahan decision, there was an upswing - in the direction of normalcy - of arrests in illegal bookmaking and narcotic possession cases. However, there have been numerous instances - especially in narcotic possession cases - where narcotic officers, because of the uncertainty in establishing probable cause or lacking specific and detailed information, sincerely believed that they were not in a tenable position to make an arrest. Unfortunately, until the matter at hand is clarified, such a condition will continue to affect the officer.

The general rule that a reasonable search may follow a

lawful arrest is now lent emphasis under the exclusionary rule. The laws pertaining to arrest, search and seizure were enacted in 1872 with pertinent statutes not having been materially altered since then. Now, more than ever, it becomes necessary to carefully review and compare the case law pertaining to arrest, search and seizure in order to fulfill our obligations as peace officers. At the same time, it would be wholly unrealistic to expect the officer in the field to make split-second decisions on the premise that he have at his fingertips the many court decisions that materially affect such matters as arrest, search and seizure.

We well recognize that conditions have changed; in fact, many words have changed in meaning and in their everyday use. Science and technology have dramatically altered and changed our very culture and way of life.

Accordingly, the peace officer must be properly informed in order to continue to protect constitutional guarantees, and to effectively keep pace with modern requirements of law enforcement. He therefore has need to be provided with rules relating to arrest, search and seizure, along constitutional lines that are certain, simple, and adequate.

Relative to the waiver of the exclusionary rule, so far as it applies to narcotics, I am favorably inclined. Yet consideration should also be given to its application in such major crimes as murder, kidnapping and extortion.

As to specific recommendations, may I make this statement:

There are numerous sections of the Penal Code, which apply to arrests, search and seizure. A comprehensive study should be made to simplify and modernize these laws. Inasmuch as law

enforcement officers, prosecutors, and members of the judiciary are vitally concerned in the administration of criminal justice, I urgently recommend that such a deliberate and comprehensive study be the combined efforts of law enforcement officers, prosecutors and members of the judiciary.

That concludes the Sheriff's statement.

I have had the misfortune, or fortune, I don't know how you would interpret it, of having worked as a federal agent for the F.B.I. for twelve years when I operated under the federal exclusionary rule. I can draw a parallel to my experience, our experiences, in the federal government in our application of the law of searches and seizures. I can draw a parallel to what is happening here in our state courts. If possibly this would be the only step, maybe we might live with it. I don't think we could though. I think that there will be an extension, a limitation, and a greater restriction on the activities of the law enforcement officers. I am not going to go into the background of this. I think that it was adequately done yesterday by a lot of experts. I feel that I have gained a lot by this hearing that I can take back to our people, our operating personnel, in the way of some explanation and clarification.

Now, we agree there is no doubt that the exclusionary rule criticizes the officer's conduct in illegally obtaining evidence and at the same time condoning the acts of the criminal. As Mr. Crittenden has said here, we likewise resent that. We resent that as police officers. Our attitude - and we emphasize it to our operating personnel - is that we serve the people and that the people don't serve us. We don't like the implication

that we either teach, advise, or condone improper or illegal activities.

Now, our people in the field are very definitely confused. They are limited and they are restricted in their operations. In explanation of the statement that the Sheriff made immediately after the Cahan decision we had the drop and then an upswing toward normalcy, we don't feel that our figures, although they are rather extensive - and I will leave you some copies of them to study at your leisure; I have some graphs and charts that are self-explanatory and some attached sheets that will explain them - give a clear enough picture of what is to come. We are more fearful of the restrictions that will be imposed upon us later with the extension of this rule.

I was particularly interested in Mr. Lynch's real case which takes the place of a hypothetical case which I had to offer to you, and that is this very simply. We have a large number of murder cases where the murder presumably is committed here in Los Angeles County, and a week or two weeks later perhaps the suspect is arrested in Las Vegas. We are completely powerless to come back to the scene of the crime or to his home where we may find the murder weapon or evidence that is necessary to convict him. I know of no way that we can obtain that evidence at the present time.

I was interested in the Chairman's description of his operations yesterday during the course of his tour of duty with the F.B.I., and I think that illustrates a point too. I will carry it a step further. In the Federal Government we were forced to seek subterfuges or circumvent the restrictions placed upon us,

and the simplest way was for us to go out and get the local officer, the police officer or the deputy sheriff, to make the arrest for us, and then, of course, the evidence that he seized could be introduced in federal court, whereas the evidence seized by us would be excluded under the same conditions. That was a subterfuge and a circumvention. Now, this is not only denied to the federal officers, but it is denied to us in our own operation in our own field of activity by the application of this exclusionary rule.

We are making every effort possible to help our people live with this. Anything I would say or anything I could add would be repetitious of the things that have been said by the others who preceded me. We don't welcome the situation. We do need some help. We feel that the criminal continues to receive the benefit and the protection of our laws, and we don't receive corresponding help and assistance from the Legislature or from the interpretations to help us in doing our job. I am fearful that if we await a judicial interpretation to determine this, or a series of judicial interpretations, that it is going to be to our detriment; in addition it will be too long a wait. I think that the only way that this thing can be corrected at the present time is by appropriate legislation, and I think that that legislation has to have the complete support of the prosecutors and the judiciary, in addition to the law enforcement officers, so that we will be in a position to tell our people just what they can do. They are anxious to do a good job. Now, let me point out this in defense of these police officers who are accused of committing illegal acts. These officers have no other personal motive

in accomplishing their job except in doing a good job. They don't particularly receive a promotion or an advance in pay for the solution of a case on that basis alone. It is the accumulation of those things, of course, that helps a man progress in his field. He has no other incentive to solve these cases except to perform his responsibility and his duty. He isn't anxious to incur civil or criminal liability for performing acts that are only performed for the purpose of discharging his duty.

I will tell you another development in law enforcement in the past five years. Not only our people, but people in all fields of law enforcement have gone out and, at their own expense, have bought and paid and maintained an insurance policy which protects them in cases up to a point. It protects them in cases of false arrest and civil suits for their misconduct. They are serious enough if they are willing to pay that. I think that very definitely should be covered by the respective government. Of course, that is a point aside from the matter being considered here.

I only hope that some legislation affecting this exclusionary rule can take place before we have some sort of a serious sex offense against some child where the perpetrator will be allowed to go free because of this exclusionary rule. I am not minimizing the effect on narcotics because that is serious in and of itself.

That concludes my statements.

CHIARMAN SMITH: Thanks, Mr. Pitchess. Any questions? Mr. McGee.

McGEE: I am a little confused on that instance you cited of

a murder where you arrest me for a murder and you cannot get a warrant to search my premises for the murder weapon.

PITCHESS: No, we don't know what - we don't know exactly what - you mean to get a search warrant after we arrest you?

McGEE: Yes.

PITCHESS: The use of search warrants is virtually negligible in Los Angeles County. I was appointed undersheriff approximately three years ago, and I don't recall a personal instance where we were able to obtain a search warrant in the course of our investigative activities. Is that right, Chief? The Chief of Detectives is here. Have we used a search warrant recently, or do we use them at all?

CHIEF OF DETECTIVES: No, sir, we don't.

PITCHESS: As Mr. Crittenden, I think, covered that point, it would be difficult to state with particularity the exact evidence that we are looking for, the type of weapon. We would probably know, maybe, that it was a gun. We have to know, with some degree of certainty, because we have to make an affidavit to this extent that we know with a degree of particularity that the gun is located within the premises and approximately where it is located in order to get that search warrant.

McGEE: Has that process of the requirement of extreme particularity been arrived at by virtue of judicial decisions or merely in the statute? Do you know offhand?

PITCHESS: I don't know offhand. I know this, that when I went into law enforcement in 1940 directly from law school, I know that in the Federal Government we were faced with the same situation. Search warrants were almost negligible in their use in the

Federal Government. I know that they are so difficult to obtain that the police officer does not consider it an effective tool to use in his work.

McGEE: Well, now, what do you mean that they are so difficult to obtain? Will a court not sign them because they lack that degree of particularity that you speak of?

PITCHESS: Right. We don't have enough knowledge in advance except that we know that a certain murder weapon was used, we know that a certain murder weapon must exist someplace. Most likely, and based on our experience, it is usually hidden, in many instances, at the home of the suspect and the perpetrator of the crime. We can't describe it with enough particularity nor its exact location in order to go in and make the search. In addition, we want to search for other evidence. You have heard, yesterday, considerable discussion over the fact that no search warrant will allow you to go in and look for fingerprints, or at the scene of the crime, for instance, it won't allow you to look for any type of evidence. You have to go in to seize. It is used only to seize a particular type of property that you know exists, the exact location of it so that you can describe it with particularity.

McGEE: Thank you.

CHAIRMAN SMITH: Thanks very much, Mr. Pitchess. Now, Ernest Roll, District Attorney of Los Angeles County.

S. ERNEST ROLL: Would there be any objection if I had a couple of men come up here with me?

CHAIRMAN SMITH: Not at all.

ROLL: Mr. Chairman and gentlemen, I have prepared a statement, and with your permission I will give each one of you a copy

of that statement. I may, in some instances, leave the statement and go a little further than what is contained in the statement, and I also gave you a book there that bears on the law of searches and seizures.

This is Arthur Alarcon. He is the Deputy District Attorney in my office, and Mr. Howard Heard, the Chief of my Complaint Division, is in the audience. Mr. Alarcon is the gentleman who prepared this book on the law of searches and seizures.

CHAIRMAN SMITH: For the benefit of the record, it is Arthur L. Alarcon, and the other gentleman's name is Adolph Alexander.

BRADY: Mr. Alexander is the Chief of the Complaint Division?

ROLL: No. Mr. Adolph Alexander is the Assistant Chief Deputy in the District Attorney's Office. Among other duties, he is a liaison officer between the District Attorney's Office and all of the police agencies, and among other duties, he is what I consider one of the most able trial lawyers in the District Attorney's Office.

At the outset I would like to give a little historical background, if I could, in connection with the exclusionary rule of evidence, particularly as it pertains to California. I know that a lot of us are familiar with it, but I appreciate that this Assembly committee unquestionably will write this matter up, and I think it should be contained in the record.

On February 8, 1954, the Supreme Court of the United States decided the case of People v. Irvine. This was a matter wherein officers entered a home in the City of Long Beach without the permission of the owner, and in that home concealed a microphone to secure evidence in connection with violations of Section 337(a)

of the Penal Code, bookmaking. There was a conviction obtained. It went to our State Supreme Court and then to the Supreme Court of the United States, and in that particular opinion it is interesting to note that Chief Justice Earl Warren, who, as we know, at one time was the District Attorney in Alameda County, thereafter Attorney General of the State of California, and thereafter Governor, and the man who started the California Crime Commission, concurred in the opinion in the main which was writtten and the one which I think directly led to the Cahan decision. The opinion in the Irvine case, as announced by Earl Warren, condemned this practice of the installation of bugs where they were done by means of trespass, and in fact Earl Warren and the other Justice in the opinion stated the following:

"Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment".

As a part of this opinion - and gentlemen, I will leave with you a copy of this opinion so that you may have it; I think probably both you, Mr. McGee, and Mr. Smith are familiar with it, but there is one thing that I want to point out in the opinion. It is the one written by Justice Jackson, and, as I recall, concurred in by Chief Justice Warren. He says that insofar as this conduct on the part of the officers is concerned, it should be referred to the Department of Justice for investigation, and may I tell you that it was referred to the Department of Justice for investigation, and may I read the language that the Court used:

"We believe the clerk of this court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for the attention of the Attorney General of the United States".

However, Mr. Justice Reid and Justice Minton did not join in this paragraph. Now, this is the opinion, I have said, of Justice Jackson and in which the Chief Justice concurred. When I received this opinion I must have read it ten times, and I immediately, after consulting with other members of the District Attorney's Office, requested an opinion of the Attorney General of the State of California, Edmund G. Brown, asking for clarification as to what, among other things, constituted unreasonable searches and seizures, and what the rights, powers, and duties of police officers were in connection with matters of this character, and the Attorney General of the State of California, in an opinion dated September 4, 1954, had this to say:

There can be no room here for quibbling over the holdings of the Irvine case. The articulate premise of the decision is that officers involved have violated Irvine's constitutional rights. Therefore, law officers who engage in such conduct violate their oath to support and the follow the Constitution of the United States and the Constitution of the State of California".

This is the language of the Attorney General of the State of California, and I will leave with this committee a copy of his opinion.

We now come to the Cahan case. In May of 1953, the Los Angeles Police Department, through its vice officers, brought to the Complaint Division of the District Attorney's Office evidence gathered in January and April of that year which showed that Cahan and others were engaged in bookmaking in the City of Los Angeles. The defendants subsequently were tried and convicted before the United States Supreme Court had handed down its strong decision in the Irvine case. I am saying that because no blame should be put on the officers in connection with that matter because the Irvine case had not come down.

Since the Cahan conviction was based in part on evidence gathered by what the Supreme Court of the United States has called trespassing officers, the defendants appealed to the California Court, and on April 27, 1955, won a reversal.

I think all of you are familiar with the holding of the Cahan case. In substance it is that evidence obtained in violation of constitutional guarantees is inadmissible. Now, this is very interesting to note and very significant. In the holding of the majority opinion, the court - our State Supreme Court - in the Cahan case had this to say:

"In determining a rule of evidence applicable to the State Court, this Court is not bound by the decisions which apply the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them . . . instead it opens a door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by constitutional provisions in the interest of society and the suppression of crime".

Now this opinion we must have read many, many times. (I am leaving my prepared statement.) When this opinion came down, we immediately got it mimeographed and sent it to practically every man in the District Attorney's office and every judge on the Bench. I think you can all appreciate the consternation, the difficulties, that were encountered immediately upon that opinion coming down because there was, for a period of two or three months, a condition of chaos because of the sudden change.

Immediately upon the announcement of the decision in the Cahan case, as District Attorney I called a meeting of the Chiefs of Police, the Sheriff, and other law enforcement agencies in this county. Attorney General Pat Brown attended that meeting and along with myself advised the officers generally in connection

with the opinion. May I say that Adolph Alexander, as a trial deputy, made several statements at that particular meeting and sent it into a general discussion as to the effect of the opinion at that time. I thereafter assigned Deputy District Attorney Arthur Alarcon to provide a brief on the subject of the exclusionary rule of evidence, and that is the printed brief that is there in front of you. May I say that that brief was furnished to each chief of police in this county. The larger departments received several copies, as high as fifty. Each judge in Los Angeles County, both municipal and superior, received a copy of the brief, and the Supreme Court heard about it and they wanted a copy and they got copies of it.

Now, I mention this chaos. In order to pass upon matters involving the exclusionary rule of evidence, both pending in court and being received by the Complaint Division, I set up a board of five deputy district attorneys - actually six. I didn't put in Mr. Alexander, but he should be in there. This board was composed of Chief Deputy Goerge Kemp, Assistant Chief Deputy Adolph Alexander, Chief Trial Deputy Al Colgrove, the head of the Complaint Division, Howard Hurd, and Deputy District Attorneys Alarcon and Nathanson.

As you gentlemen know, district attorneys and city prosecutors act in a quasi-judicial capacity when issuing criminal complaints. This has been decided by our appellate courts. We actually exercise quasi-judicial functions. Therefore, I have ordered that in all cases where the exclusionary rule appeared to be involved, that the board I mentioned must first review the facts before a complaint is issued or where we had a matter pending in court, we

should get up there before the Cahar decision came along, that the trial deputies consult with the board. I have checked the records and found that since the Cahan decision was handed down - and I am speaking now because the majority of the work, particularly in Los Angeles County, comes from the Los Angeles Police Department - only 19 felony narcotics complaints sought by the Los Angeles Police Department have been refused by my office because they were based on evidence objectionable to the Supreme Court in the Cahan case.

This board further passes upon cases which are dismissed by the municipal court judges who were sitting as committing magistrates in preliminary hearings where the dismissal involves the application of the Cahan decision. The board actually recommended five of such cases involving six defendants be referred to the Los Angeles County Grand Jury last year for their consideration and for indictment, and all five of these cases involving the defendants were so submitted. I have named them: Willie Gould, Clarence and Celeste Winfrey, Alfred W. Gregg, Robert Dorsey Sayles and Joe Cardona. Indictments in each of these cases were returned by the Grand Jury to the Superior Court. This procedure was adopted so that the superior courts would have the opportunity of legally passing on these matters.

In connection with the pending cases, this board also passed on the feasibility of taking appeals, and there are approximately twelve cases this office appealed in connection with the matters involving the exclusionary rule. May I say that Judge David Goldman, the then presiding judge of the Criminal Division of the Superior Court, was extremely cooperative in connection with these

matters. You can appreciate that these cases that we took up on appeal were ones where the evidence had been gathered before the Cahan decision where a preliminary hearing had been held and where the man has been held to answer, and then the defense counsel came in on a motion of 995 to set aside the information, and Judge Goldman made his rulings and put the people in a position where they could appeal. Now these steps were necessary because we felt that it was necessary to get some immediate decision from the Supreme Court of the State of California on the various points involved in these cases so that law enforcement officers would know how to proceed when confronted with these problems in the field. The Supreme Court took these cases over from all appellate districts throughout the State on order of Chief Justice Gibson.

As you know, in matters of this character where there is an appeal taken, they go to the appellate district first. We have nine appellate judges here. There are actually four districts throughout the State, and under the rules of the Supreme Court, the Chief Justice can order cases out of the District Court of Appeals.

I contacted Presiding Justice Thomas P. White and asked him if he thought it would be all right for me to write the Attorney General a letter asking the Attorney General to ask the Chief Justice to invoke his right to take these cases out of the appellate court and take them into the Supreme Court, thus saving about six months time and making for uniformity in the decision. Justice White told me that he thought it was an excellent idea and said as a matter of fact he would go further. He contacted every appellate court justice in this area and wrote a letter to the Chief Justice asking him to take over these cases, and the Chief

Justice made the orders.

Now it is interesting to note that the Supreme Court has already passed on five of the cases from Los Angeles County, three of which they ruled in our favor. There are actually twenty cases that are pending in the Supreme Court of the State of California, as I understand it, involving the Cahan decision, and the last one that came down came from Alameda County. This is a decision which is dated the 29th of December, 1955. It is in the Supreme Court En Banc, John Rogers, Petitioner v. The Superior Court of Alameda County. In this particular case, the petitioner, Rogers, and a man by the name of Elliot were charged with posing as kidnappers for the purpose of extorting money and on another count with attempted extortion. Petitioner made a motion under 985 to set aside the information, and the District Court of Appeals issued this writ. Briefly, the facts were these, and I will read just enough of it so you can follow me. "On April 28, 1955, the fourteen year-old daughter of Dr. Charles S. Bryan, Jr., disappeared. Late in the evening of April 28th or 29th, Dr. Bryan received a telephone call from an unknown voice that advised him that if he delivered five thousand at a specific location his daughter would be released. When he asked for proof that the caller had his daughter, another voice replied 'I ain't got no proof. It is just a chance you will have to take. Bring it to 8th and Market, and she will be turned loose.' The second voice stated 'If there is any slip-up, it will be your daughter's life, not mine'. In addition to this evidence, admissions made to the police by the defendants following their arrests were introduced".

The petitioner was arrested on the 17th of May and was not

taken before a magistrate until the 25th of May, a period of eight days. It was during this period, on the 21st of May, that he made the admissions to the arresting officer that connect him with the crime. Now petitioner, that is one of the arrested persons, claims that without his admissions there was no evidence to connect him with the crime and that his admissions were inadmissible on two grounds, one, corpus delecti not being proven and, two, and the one I am going to mention here, that they did not come in within the exclusionary rule - or they did come within the exclusionary rule.

Now let me go over to Page 7 and see what the Supreme Court has to say in connection with that:

"There can be no doubt that the admissions were made during (that is his conversations where he made admissions, possibly in the nature of a confession) the period of illegal detention".

The arresting officer testified he arrested the defendant thereafter on the 17th - the conversation was held about 10:15 on May 21st, or approximately 90 hours after the arrest. Even then the defendant was not taken before a magistrate until May 25th, eight days after his arrest. Section 825 of the Penal Code provides:

"The defendant must, in all cases, be taken before a magistrate without unnecessary delay, and in any event within two days after his arrest, excluding Sundays and holidays".

With an asterisk they point to Section 145 of the Penal Code which says:

"Every public officer or other person having arrested any person upon a criminal charge and willfully delays to take such person before a magistrate having jurisdiction . . . is guilty of a misdemeanor".

Now, that is a point they raised, and here is what the Supreme Court said in connection whether it comes within the exclusionary

rule:

"There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and of California and the law as enacted thereunder and involuntary statements made during a period of illegal detention.

"It may be true, as petitioner contends, that had he been arraigned within the 48-hour period and advised of his rights, he would not have volunteered to say anything. Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during the detention that there is between illegal searches and seizures obtained thereby, or between coercion and a confession induced thereby. The evidence obtained by an illegal search or by a coerced confession is a necessary product of the search or the coercion. When questioned by arresting officers, a suspect may remain silent or make only such statements as serve his interest. The victim of an illegal search, however, has no opportunity to select the items to be taken by the rummaging officer.

"The record of the preliminary examination is devoid of any implication that a detention in this case was resorted to with the purpose of inducing admissions, and the petitioner makes no contention that they were not freely and voluntarily made. Accordingly, since there is no evidence that the illegal detention produced the admissions, we find the exclusionary rule inapplicable".

I bring this to you because this is one that came down as late as the 29th of December. So the Supreme Court, when it said "We are not going to be bound by the strict federal rules, and we will carve out some rules for the conduct of officers", I think, meant what they said.

Several years ago, in connection with this over-all problem, the Los Angeles County Grand Jury and law enforcement officers adopted a technique of what we call mass indictments, particularly in connection with the sellers of narcotics. For your information the 1955 Los Angeles County Grand Jury, based on Los Angeles Police Department investigations, returned the following

indictments against individuals charged with narcotics offenses: February 7, 1955 - 41 (39 of which were sellers and two for possession); June 8, 1955 - three individuals indicted for possession; (These cases involved the exclusionary rule). June 21, 1955 - 22 individuals indicted for sale; November 15, 1955 - 35 individuals indicted for sale.

On September 27, 1955, the Grand Jury also indicted nineteen individuals solely on evidence gathered by the Bureau of Investigation of the District Attorney's Office. This is also in connection with narcotic matters.

In this connection, it is interesting to note a letter received by Deputy District Attorney Fred Henderson, Legal Advisor to the Los Angeles County Grand Jury, from Deputy Chief of Police Thad Brown, Commander of the Detective Bureau of the Los Angeles Police Department. The letter is dated October 20, 1955. In this letter Chief Brown points out that:

"As our techniques in the field of narcotic enforcement have improved, we have found it possible to reach an increasingly higher strata of narcotic peddler violators".

This letter further states:

"Of interest to the present Grand Jury, which since February of this year has indicted 71 persons as a result of evidence presented by the Narcotic Division of this Department, is the records of 90.2 convictions with the major portion of this percentage being sentenced to the state prison for a term of ten years to life".

At this point, in view of some of the statements which have been made, I desire to publicly state that as the chief legal prosecuting officer in Los Angeles County, I firmly believe that we have on our superior and municipal bench of this County the finest group of judges in any community in our Nation. The judges

of Los Angeles County will administer the law as you members of the Legislature enact it and will follow the decisions of the Supreme Court of the State of California, as should all persons engaged in law enforcement.

Now, with that somewhat lengthy background as to what we have been confronted with, I have some positive recommendations to make and then some suggestions, and I will speak about remedial legislation.

It is my belief that by reason of the adoption of the exclusionary rule of evidence in California, certain remedial legislation is necessary and that Governor Goodwin Knight should be requested to open the call for the same at the March, 1956 Session of the Legislature of this State. As a matter of fact, as District Attorney I personally made this written request to Governor Knight in June of 1955.

May I say to the committee, and especially Chairman Smith and Pat McGee, that before the last session convened certain legislation was recommended. The time was short, and I know the great interest that both of these gentlemen have in this matter, and they were more than cooperative in connection with some suggested legislation at that time, but time did not permit the Legislature, during its regular session to consider it.

It is my positive recommendation that the California statutes on search warrants and the law of arrest should be amended, revised, and in some instances new laws should be enacted. This legislation can be enacted in such a manner as to protect constitutional guarantees and yet give the law enforcement officers new legal weapons needed in their war on crime and criminals.

Now on the subject of search warrants. The California statute on search warrants now includes the following:

1. Items which have been stolen or embezzled.
2. Items used as a means of committing a felony.
3. Items in the possession of a person with the intent to use the same as a means of committing a public offense.
4. (And I don't know for the life of me what this means) Items such as casks, kegs, bottles, vessels, syphons, etc., which bear trademarks and are in the possession of any person except the owner thereof with an intent to sell or traffic in the same. (Now that is in Section 1524 of the Penal Code)

Thus, it can be seen at the present time that the right to a search warrant is highly restricted and can only be used in a very limited field. There is an urgent need, therefore, for modernization of the law pertaining to search warrants in the light of the exclusionary rule.

The Fourth Amendment to the Federal Constitution and the California Constitution, Article I, Section 19, provides:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant issued but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized".

Both the spirit and letter of the principles enunciated in the Cahan case would be carried out if the Legislature broadened and modernized Penal Code Sections 1524 and 1525 on search warrants.

My recommendations with regard to search warrants are two-fold in nature; one pertains to property which tends to show that a public offense has been committed; in other words, evidentiary matters, and two, covering the field of narcotic violations.

In regard to number one, I believe that the statutes concerning search warrants should be amended to set out additional items which can be seized under search warrants and thus permit the legal seizure of incriminating matter of an evidentiary nature.

Good police investigative techniques often require that a careful search be made of the scene of the crime to determine if there are some tangible clues which point to the commission of a crime and to the perpetrator thereof. Such things, for example, as fingerprints, hair, fibers, threads, bloodstained clothing, etc. often lead to the arrest of persons guilty of a crime. Without this type of evidence, many of our criminal cases would be lost, and many of those responsible for crimes would never be apprehended.

We feel it necessary, therefore, to include within the things which may be seized upon a search warrant evidentiary matter.

You had as a witness here Professor Edward L. Barrett, Jr., and from an article which I read several times in the California Law Review under date of October, 1955, he has the following statement to make in connection with search warrants:

"As a matter of practice, however, search warrants are seldom used by the police. In populous Los Angeles County, for example, only 17 search warrants were issued in all of 1954. Several reasons are offered by police and prosecutors for this failure to use the warrant procedure. First, the limitations as to the types of property for which the warrant may issue; second is the requirement of particularly describing the property to be seized; and third, the time necessarily consumed in the issuance of the warrant".

Professor Barrett, in a footnote, sets out the affidavit of William H. Parker, Chief of Police of the City of Los Angeles, in the case of People v. Cahan, wherein the Chief makes these observations:

"Under Section 1524 of the Penal Code, a search under a warrant may not be made for evidence as such, but only for stolen property or for the tools of a crime, although they also may incidentally be material evidence of a crime".

And may I say I agree entirely with both Chief Parker and Professor Barrett in their comments in connection with the restrictions of the general search warrant law.

Under the proposed amendment which is set forth on this page, evidentiary items could be seized by law enforcement officers under a search warrant. A magistrate would first pass on the propriety of the affidavit for the search warrant, and none would issue except on probable cause. In this manner the constitutional rights of the person involved would be fully protected. To cover the situation, I propose the following amendment to Penal Code Section 1524, to be known as 1524 Sub. 5, adding to the items which can be seized under a search warrant, the following:

"When property consists of any item which tends to show a public offense has been committed, or tends to show that a particular person has committed a public offense".

Now to go into the second phase of suggestions under search warrants: Proposed Amendment to Search Warrant Laws in re Narcotics. 1525 of the Penal Code provides:

"A search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched".

Nowhere in the statute does a definition exist of the phrase "probable cause". Now let's go back to what our Supreme Court did. The California Supreme Court recently stated in the case of People v. Boyles, which was filed by the Court on November 25, 1955 - this being one of the cases we took up from Los Angeles

County - that probable cause may consist of information obtained from others and is not limited to evidence that would be admissible on trial of the issue of guilt.

I propose codifying the recent holding of the Supreme Court decision in the Boyles case insofar as a reference to the type of information necessary for probable cause. In this matter, two objectives would be accomplished. First, the law would be uniform with relation to the type of information necessary to justify searches based on probable cause without a search warrant as an incident to a lawful arrest, and searches made pursuant to a search warrant based on probable cause.

Second, because illicit traffic in narcotics is done under cover, it is almost impossible to trap the peddlers or sellers of narcotics without using informants. Unless the officers can assure informants that they will be protected from retribution, no one will come forward and assist in the apprehension of the big entrepreneurs in narcotic peddling.

The enactment of this new section will still afford private citizens full constitutional protection demanded by the California Supreme Court. Before a search warrant would issue under the proposed section to search an individual's property or person, a magistrate would first have to decide that probable cause exists.

The necessity for the protection of the identity of the informants has long been recognized by both the Legislature and the appellate courts. (Sections 1881.5 of the Code of Civil Procedure, and People v. Gonzales, 136 A.C.A., 476, October 21, 1955.) In this case, the court stated:

"It is clear that the public interest would suffer if the disclosure were compelled of the names of those citizens who informed public officers of violations of law and who assist such officers in the performance of their duty to apprehend law violators. A citizen who knows that the fact would be made public that he has disclosed such information to public officers may be loathe to cooperate in the administration of justice. By exercising his right and duty to make such disclosures, he would justifiably believe himself to be in danger of physical violence from those upon whom he had informed, as well as in danger of actions of slander and malicious prosecution".

In order to give law enforcement agencies much needed help in the narcotics field, the following specific recommendations are made concerning new legislation:

1. An addition to existing Penal Code, Section 1524, to be known as 1524, Subdivision 6 (New).

"When the property is a contraband, or a narcotic, the use, possession or sale of which is prohibited by the State Narcotic Act, in which case it may be taken on a warrant from the place in which it is concealed, or from any person in whose possession it may be".

2. I further recommend 1525(a):

"When the property seized is a contraband, or a narcotic, the possession, use or sale of which is prohibited by the State Narcotic Act, the affidavit for a search warrant shall be sufficient if it is based on information obtained by the person signing the affidavit, from a reliable informant; the identity of the informant need not be revealed where the public interest would suffer by the disclosure".

Now, let's pass to the law of arrest. Generally speaking, a search incident to a lawful arrest which is contemporaneous as to time and place or which is subsequent to the arrest, may be a reasonable search and seizure even though the arresting officer has no search warrant. As we all know, I think, if there is a lawful arrest, the officer may search the individual as an incident to that arrest. Therefore, it becomes very important

in view of this exclusionary rule of evidence to look at our law of arrest and see what it contains. In California the pertinent statutes in connection with the law of arrest have not been materially altered since 1872. Since then a number of innovations have had considerable have had considerable impact on the technique of law breaking and law enforcement. Actually, the California law of arrest is a lot older than 1872, since it is based almost completely upon the provisions of the proposed Code of Criminal Procedure reported back in the New York Legislature in 1850, which in turn had its roots back in the Common Law.

The law of arrest by peace officers illustrates the discrepancy between existing statutes and developments in case law which have attempted to keep pace with the modern requirements of law enforcement. In my opinion, our present law of arrest can be classified as being horse and buggy legislation in an electronic age. As a result of these antiquated statutes, the general public and most law enforcement officers have no readily available source of information as to the law of arrest. They are required to search the records of reported cases in the State of California in order to determine the modern interpretations of the law which in some instances affirm and in others modify or even contradict the language of the statutes.

Now, just to give you an example of what I am talking about, I read you a case this morning which came down on the 29th of December of this year, known as the Rogers case. I don't know at the present time what the belief of a lot of officers engaged in law enforcement is, but I know, not too long ago, that they believed legally that they had the right to hold a person 72 hours. I have

heard many of them say "we can hold them 72 hours". You heard this case - it said 48 hours. That is just one simple example of what I am talking about when I say we need specific legislation to clarify the law of arrest.

Immediately after the Cahan decision came down, members of District Attorney's Office of Los Angeles County and of the Los Angeles City Attorney's office met together and prepared a draft of the changes of the law of arrest to meet the requirements of modern law enforcement. Copies of this draft I now submit to this committee.* That is in the back, and I think most of you gentlemen, at least Mr. McGee and Mr. Smith, have seen those. Those were the last ones that were sent up.

This proposed draft has been submitted to a committee formed under the jurisdiction of Attorney General Edmund G. Brown. A subsection of this committee, under my chairmanship, has been given the task of preparing for the Legislature changes in the law of arrest.

This committee is at the present time considering the recommendations of law enforcement officers throughout the State as to any changes they may wish in the proposed draft. At this point it is also interesting to note that the Supreme Court, and I mentioned this before, has under submission approximately 20 cases involving the law of arrest and searches and seizures. The proposed amendments that I submit here today should be viewed in the light of any later decisions that may come down from the Supreme Court on this matter, and this is just an interesting comment: Mr. Alarcon, who worked on this particularly, told me that the Supreme Court has been, in at least one or two instances, more

liberal in these cases - at least 22 instances - than in the proposed law of arrest.

Now, on the next subject, and this one that confronts lawyers and prosecutors more, probably, than the law enforcement officers, but it is a very important problem to us, on motions to suppress evidence. I recommend that the Legislature also fix by law a statutory time for motions to suppress evidence in criminal cases wherein it is alleged that the evidence was illegally obtained in violation of the exclusionary rule and constitutional rights. In considering this matter, the Legislature might take into consideration the federal laws in this regard.

Now we get to another subject, the installation of dictagraphs, sometimes referred to as "bugs". We have on the statutes of the State of California a section known as 653h of the Penal Code. It was enacted in 1941, and it reads as follows, and I won't read the entire section, but I will read the portions which I consider to be pertinent:

"Sec. 653h. (Unauthorized installation of dictagraphs; Grade of offense; Persons exempted.) Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictagraph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; . . . provided, that nothing herein shall prevent the use and installation of dictagraphs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals."

In connection with this section, I specifically recommend that the Legislature amend it by striking out the following language, that is the latter portion which says:

" . . . provided, that nothing herein shall prevent the use and installation of dictagraphs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney" (this recommendation may seem strange at first, but I do it for several reasons) "when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals".

This recommendation is made for several reasons. In the opinion of Attorney General Edmund G. Brown, dated September 4, 1954, which the District Attorney requested as to his interpretation of the Cahan opinion, this opinion being known in the Attorney General's office as 54-41 - in connection with this specific section, 653h, the Attorney General said:

"It seems clear that a search and seizure by a lower law enforcement official which violates the Constitution cannot be other than unlawful when committed by the head of the police department or district attorney. If anything, the violation would seem more flagrant. The Fourth Amendment protects the people from unreasonable invasion of their privacy by the police. Obviously, the determination of what is reasonable cannot be left to the police.

"The conclusion is compelled that the invocation of Penal Code 653h can give the police no greater rights than if the section did not exist. Their conduct should be governed accordingly".

Now, let's see what our Supreme Court - that is the Supreme Court of the State of California - said in connection with Section 653h:

"Section 653h of the Penal Code does not and could not authorize violations of the Constitution and the proviso under which the officers purported to act at most prevents their conduct from constituting a violation of that section itself. . . . The evidence obtained from the microphones was not the only unconstitutional evidence introduced at the trial over defendant's objections".

Our Supreme Court specifically says that latter part of that Section is unconstitutional.

Thus, it can be seen from the opinion of the Attorney General, and the opinion in the Cahan case, that the latter portion of this section is unconstitutional and should be stricken from the statutes. By doing so, it will call directly to the attention of everyone that if there is a violation by anyone of this section they can be prosecuted.

Consideration should be given by the Legislature in connection with this section as to whether or not the penalty provided therein is severe enough or whether it should be made a felony. I further recommend that the Legislature make it a criminal offense for anyone to use or attempt to use or communicate in any manner for any purpose any information obtained by the use of a dictagraph in violation of Section 653h. It should be noted that Penal Code Section 840, which is on our statutes at the present time, makes it a criminal offense for anyone to use or divulge information obtained by wiretapping.

It is interesting to note that Professor Barrett, who testified here, in this same California Law Review article entitled "Exclusion of Evidence Obtained by Illegal Searches - A Comment on People v. Cahan", said as follows:

"What then is the answer? Partly, of course, it lies in the direction of making more definite the rules governing police action. A clear legislative prohibition of the use of dictagraphs, for example, could be implemented by the imposition of personal penalties upon offending officers without interfering with effective police action in other ways".

It may be interesting to note that, to my knowledge, no case that we have prosecuted in the District Attorney's office involving a violation of the State Narcotic and Drug Act has been made in the past by the use of microphones or bugs installed in

dwellings, houses, and the like by means of trespass. In other words, this technique has not been used by the law enforcement agencies in this county in connection with narcotic violations even before the Irvine case, the Attorney General's opinion, or the Cahan decision.

Now, if I can speak just briefly off the record that I have written here in connection with this. One of the reasons that I threw this out - not as a specific recommendation - to the Legislature is that they possibly could consider increasing it from a misdemeanor to a felony, and this is based on several factors: First, you know the statute of limitations in a misdemeanor is one year and a felony ordinarily is three, and if the latter part is put in there, which I recommend, that if someone publishes this you can see what can occur, and I am not speaking now of law enforcement officers. I am speaking of some people who, some way or another, make a living out of doing some of these things in installation of bugs and getting information on people and using it for several purposes such as blackmail and the like. It has happened, and you can read some of the magazines that are on the public newsstands today and see what has been done. These men who get this information by means of a bug wait a year and then, after the year has gone by, where the statute of limitations has run, they will sell this information to some periodical, and they, in turn, will print it, probably in the East, and there is nothing to prevent them from doing so and nothing to stop any of this sort of thing whatsoever. I direct that to your attention because I am not speaking in connection with law enforcement agencies when I make the comment

in connection with increasing the penalty.

Now, should the exclusionary rule of evidence be waived insofar as it applies to narcotic offenses? In my opinion the only way the exclusionary rule could be waived in narcotic cases would be by way of a constitutional amendment voted on by the people of the State of California.

This amendment would have to be to Article I, Section 19 of the Constitution of the State of California, which provides as follows, and that is the one on unreasonable searches and seizures which is like the Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant issued, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized".

The State of Michigan has had the exclusionary rule since 1919. In order to give the police of the State of Michigan a freer hand in the obtaining of evidence in narcotic violations, the people of that State changed their Constitution. This was done, insofar as narcotics were concerned, in 1952. They had previously had the amendment with reference to certain types of firearms, but in 1952 it was proposed by a joint resolution of the 1952 Legislature of that State. In substance it provides that evidence obtained by unreasonable search and seizure is admissible when the item seized is a narcotic and where the seizure was outside the curtilage of any house.

Thus, by amending their Constitution, the people of the State of Michigan voluntarily gave up their right to be protected from illegal searches and seizures insofar as their automobiles, personal belongings and clothing are concerned, but you will note

that they clung to the old Common Law concept that "a man's home is his castle" and refused to permit unsanctioned invasions of of their dwelling houses and curtilages even where narcotics were involved.

If the people of this State should vote a similar amendment, I am not prepared to state what the Supreme Court of the United States would say as to whether acts done by police officers in pursuance to this amendment would be in violation of the Federal Constitution. As you gentlemen know, our Supreme Court is somewhat divided on this subject. To my knowledge no case - and we have done research on this subject - from Michigan has gone to the Supreme Court of the United States on their constitutional amendment. There is a Supreme Court of Michigan case, but not from the United States Supreme Court. I am therefore calling this amendment to your attention, not as a positive recommendation, but merely for your consideration.

Now, in conclusion may I state that I have been aware of the acuteness of the narcotic problem in this State for some time. On January 28, 1953, I called a meeting of all chiefs of police and the Sheriff of this County on this problem. They were advised that narcotic violations had become one of the major offenses in this County and the State and one of the crime-breeding problems of the day. They were requested to use every available means to ferret out violators. Additional personnel was added to many of the agencies, and the sheriff's office began an intensive training program for his own personnel not in the narcotic field, and made this program available to smaller police departments of Los Angeles County. In my opinion law enforcement

officers of this County realize the seriousness of the narcotic problem and are doing an excellent job of enforcement.

Now, along that line, may I say this. If the Governor does permit this special matter to come before the Legislature, I believe Chairman Smith authored a bill last time which, I think, was known as Joint Bill No. 6 which went to Congress and to the President.

CHAIRMAN SMITH: Oh, that would be Assembly Joint Resolution . . .

ROLL: That is the one that went back to Congress asking for more help along federal lines, and I again suggest that if the Governor calls this Special Session, you do that over again. I think it is an effective thing. I think it calls the attention to the problem, and I think that the Federal Government could do much more. I am not talking about the enforcement field, but it could do much more than they do with reference to permitting narcotics to come into this country. I have said this before, and I will say it again. California is a border state. It probably has more seaboard than any state in the country. We have Mexico on the south. Narcotics such as heroin have been banned in this country since 1923, and every bit of it that comes in here is illegally brought into the country, and once it gets in, the problem is very difficult for the law enforcement officers. As I have sometimes said, it is like the Dutch boy trying to hold his finger in the dike to keep the dike from breaking, and that is one of the reasons that I ask that the Legislature again consider doing what you did the last time.

Insofar as the District Attorney's office is concerned, though primarily a legal prosecuting agency, we have approached the narcotic

problem from several angles. In the enforcement field, we maintain a narcotic squad in the Bureau of Investigation. The men assigned work with all other agencies, and many times work on their own. One investigator, working as an undercover operator, alone has made 24 cases of sale against narcotic peddlers last year.

In the legal field, all deputy district attorneys have maintained, and will continue to maintain, a policy of firmness in the handling of all narcotic cases from their inception to their conclusion. Particular stress is laid on all cases involving peddlers of narcotics. This policy has paid dividends, and we have a record of which no one can be honestly critical. It speaks for itself.

I sincerely appreciate the opportunity of appearing before this committee and desire to compliment each of you for your time and effort and assistance that you have and will give to law enforcement.

Law enforcement has to work with the tools it is furnished. You of the Legislature, in enacting laws and in defining offenses and the penalties therefor, furnish some of the most important of these tools. I ask you to give serious consideration to implementing our tools, but only along constitutional lines.

Now I will leave copies of these various opinions. You may not have seen this; it is from the State Department of Justice. I will leave one with your committee. It is a midsummer survey from the Bureau of Criminal Statistics of the State of California dealing with, among other things, the first six months of 1954 as compared to the first six months of 1955, and it goes into it from several angles. First, it goes into it from adult felony arrests reported, felony crimes reported, and felony complaints filed.

Just briefly, it may be interesting to give you this information for the record, and if you care to put it in the record, certainly feel free to do so.

CHAIRMAN SMITH: We appreciate it very much, Mr. Roll.

ROLL: The first half of these are felony crimes reported, and they use, in this schedule, seven major offense groups. Now, I appreciate you can't report narcotics, you can't report prostitution and things like that, but they report homicide, robbery, assault, burglary, theft except auto, auto theft, and forcible rape. For the first half of 1954, compared to the last half of 1954, percentage in rate change was down for these offenses throughout the State -8.2; Los Angeles County -14.9. In other words, that figure means that for the first half of 1955 there were 14.9 less robberies, assaults, burglaries, thefts, and so forth committed in this County than there were with a comparable period in 1954. It is interesting to note that in San Francisco, however, six months for these seven crimes that I have mentioned, there were plus 10.9. This is the Attorney General's book. I didn't prepare it, and it comes from the Attorney General's figures submitted. The entire State was off -8.2.

Now, let's look at arrests reported to the California State Department of Justice by sheriffs and chiefs of police. For the first half of 1954, arrests, 31,057 for the entire State. The first half of 1955, 26,625; for the whole State, eleven per cent less from the arrests made. Los Angeles County, 18,290 arrests the first half of 1954; the first half of 1955, 17,578, -7.3. In other words, there were 7.3 less arrests made in Los Angeles County for the last half of 1955 as compared to 1954.

Now, let's go to Table 5 which is entitled "Felony Complaints Filed After Arrest as Reported to the California State Department of Justice by Sheriffs and Police" and see what the change is from 1954 to 1955. You will notice the reported crimes are down in most places. Los Angeles County, first half of 1954, 6,385; first half of 1955, 5,540, - 16.3.

Now, may I make this observation generally in considering the figures. You can look in the back of the book, starting on page 15, and it will break down each city as reported to the Attorney General as to crimes reported and to a breakdown of the arrests and the dispositions as reported for the first six months of 1955. That starts on Page 15. There is an interesting observation made by the Attorney General - or whoever the man was who prepared these figures - this is on Page 8:

"While there are many local practices affecting crime reporting and also arrest bookings in various sections of the State, it would appear that the number of persons actually prosecuted in court on the basis of a felony complaint would reflect more accurately the felony picture and general law enforcement administration of a particular county or locality".

I know arrest figures are very interesting. May I say, then, in connection with those figures that we don't have them all prepared and I may ask permission to come back this afternoon to give you some additional figures when we prepare them. One of the statisticians has been ill and bogged down on me.

Arrest figures can go up or down, depending upon a lot of situations. For example, if the Sheriff's Office and the Bureau of Investigation and the District Attorney's office wanted to go out today, we could probably, on suspicion with no evidence, arrest many people and put them in jail, perhaps two, three or

four hundred. That will bring the amount of arrests up. It is interesting to note that of the cases submitted to the District Attorney's office for criminal complaints by some of the law enforcement agencies, for example, there were submitted to the Complaint Division for the year 1955 - and I mean the main office of the District Attorney's Office - a total of 10,969 applications for felony complaints. What happened to the rest of the persons who were arrested with some of the various agencies? I think that all in law enforcement will agree that many times an arrest is made and the person is released. Sometimes they don't want to prosecute; sometimes they don't do certain things in connection with the matter that comes in to the office, and I have some figures, which I won't go into at this time, but roughly about fifty per cent of all felony arrests - and we are not asking them to bring them in - that are made in this county are not submitted to our office at all. I will give you an example, and not in connection with the Cahan case, so you can see what I am talking about, and the officers are very correct in doing this. An officer comes upon an automobile - we will say that it has run through an intersection at a high rate of speed, running through a boulevard stop. There are four or five occupants in the car. Now, the officers are entirely correct in stopping this car, and when they get them out of the automobile one of the officers observes a couple of marijuana cigarettes. He has been acquainted with this procedure and knows that they are. Now, what does he do? He says "Who do these cigarettes belong to?" and he gets no answer. If he is smart, he will pick up all five of those men and bring them in for questioning and book them, and probably

by the next morning one of them would say "They are mine". Now, in connection with those five arrests, one comes to our office for a release, and I want you to bear that in mind in connection with some of the figures that may be give here, and with your permission I may ask to come back with one of the statisticians this afternoon if we are able to get this additional matter out. If not, we will mail it to the committee. Now, are there any questions?

CHAIRMAN SMITH: Any questions? Mr. O'Connell?

O'CONNELL: Mr. Roll, I am interested in these specific proposals that you have made in connection with search warrants and with the law of arrest. However, there are a couple of things, first, that puzzle me. I would like to ask you about them. You have proposed a change in 835a, or is that a new section? It has to do with the amount of force which an arresting officer may use. It is on Page 4 of the section having to do with arrests.

ROLL: Before I answer that, let me say that if you will notice in submitting this to you I said this was the one in the hands of the Attorney General's committee, and I wanted this viewed in the light of the Supreme Court opinions that would come down and that unquestionably if the Governor did call it, there would be changes made in this. This is the one they are working on, and I want you to understand I am not making these in this form as definite and positive recommendations. This is the model they are working on. It was taken from the Uniform Arrest Act.

O'CONNELL: Well, the proposal, as I understand it, is to delete the last sentence "The defendant must not be subjected to any more restraint than is necessary for his arrest and detention",

and in discussing that I think you said that this will conform to the holdings of the appellate court concerning the use of force in connection with arrests. However, it seems to me that the only statutory restraint defining reasonableness is in the language which you propose to delete and if that were deleted, the only restraint there would be on the amount of force an officer could use would be the Constitution itself.

ROLL: You are talking about 835a, how an arrest is made and what restraint is allowed? As I mentioned, this proposed one was worked out by the City Attorney's office in Los Angeles and two deputies in my office and has been submitted to the Attorney General's committee. It reads as follows:

"How an arrest is made and what restraint allowed:
An arrest is made by an act of restraint of the person of the defendant or by a submission to the custody of an officer . . . the defendant need not be subjected to any more restraint than is necessary for his arrest".

Is that the one you are referring to?

O'CONNELL. Oh, I think I see what it is now. This language is going to be taken out of Section 835, but the effect of it will be carried forward to Section 835a.

ROLL: That's right.

O'CONNELL? All right. Now, you have also proposed an amendment to Section 849. That is on Page 7.

ROLL: Yes.

O'CONNELL: The explanation of it, at any rate - you say you want to revise the language so as to make it conform to the language of Section 825.

ROLL: I will let Mr. Alarcon answer this.

ALARCON: We did that, sir, to make the two sections consistent.

One of them appears to be indefinite and gives a greater time than the two days, and so we referred back to the other section, and we would like, in some manner, that the two sections be consistent with each other and make it 48 hours, or the two days.

O'CONNELL: Well, now, in connection with Section 849, you have recommended that different language be used than the present language of Section 825?

ALARCON: Yes.

O'CONNELL: And you haven't proposed any amendment of Section 825?

ALARCON: No. That is a matter which we are working on at the present time, sir. We want to go into the whole matter. When this draft was prepared, we limited ourselves, at that time, but we would like the whole question of arrest and the taking to the magistrate and so on to be changed. 825 should also be revised, and the new recommendations which we will make to the committee will include recommendations as to 825.

ROLL: You have that right here.

ALARCON: The recommendation is Section 825 which reads: "In any event within two days, excluding Sundays and holidays". That is the present wording. The recommendation is made that you delete "in any event" and substitute for those words "if reasonably possible". That would take care of it.

O'CONNELL: Where is that?

ALARCON: That you will find on Page 7.

O'CONNELL: That is in connection with Section 849, is it not?

ROLL: That is in connection with 825. You may be looking at the wrong Page 7. There are two. There is an introduction

to this law of arrest and then there are the proposed statutes, and the one we are talking about is the introduction. Page 7 explains that.

ALARCON: At any rate, if there is confusion, we want them both to conform.

O'CONNELL: I see. What is an example of the emergency facing the community that you talk about?

ALARCON: May I speak on that?

ROLL: Yes, go ahead.

ALARCON: We had this situation, sir, in one of the Los Angeles Police Departments. They have an office in San Pedro. They had a situation where they had two children who were lost in a lagoon or a slough area which is near San Pedro. They had to put every law enforcement officer they had there, and the fire department and volunteers, to find these children. It was the foggy time of the year, and they spent, I believe, an entire weekend and part of Monday looking for those children. They had prisoners in their lock-ups, but they had no personnel to process them, bring them downtown and go through all the booking procedure, and so, viewing that type of emergency which happened in our large police department, and I can envision some other emergency in other parts of California, such as the flood which you had up north, might make it impossible for the police to act within two days. That is why we say "emergency facing the entire community". That is the reason we ask that be put in there.

O'CONNELL: Now, a general question. Assuming that the Legislature did enact the legislation you have proposed - or substantially what you have proposed - in your opinion, would it

be possible for law enforcement agencies to do an effective job of preventing crime, catching criminals, and obtaining convictions if the exclusionary rule were also maintained?

ROLL: This legislation, including search warrants, including law of arrests, and all the other things, was drafted with that very thought in mind, and I think, in answer to that question, if thought is given to it, if you will implement the tools that law enforcement has, clarify the law of arrests, broaden your searches and seizures, you will accomplish that end.

O'CONNELL: The answer would be yes?

ROLL: Yes.

O'CONNELL: Would you have any objection, then, if the Legislature, after having enacted all of the laws that you have recommended, if it also codified the rule of the Cahan case?

ROLL: Well, may I say this, that that is up to the Legislature to determine. It has been done in Texas. You can look at the Texas statutes, and they have a statute in there that says that so far as any evidence is concerned which was obtained in violation of constitutional guarantee, it cannot be introduced in evidence. Isn't that correct?

ALARCON: Also in the State of Maryland, the Supreme Court of Maryland has ruled just the opposite as our Supreme Court has. In Maryland, the Supreme Court has said we don't want the exclusionary rule, but the Legislature of Maryland has put it in as far as misdemeanors are concerned in certain subjects.

O'CONNELL: Thank you. That is all I have.

CHAIRMAN SMITH: Mr. Brady.

BRADY: Well, a couple of thoughts occur to me, Mr. Roll.

Because you have so beautifully documented this statement you have made, I see on Page 4 you recite that the Chief Justice has taken over from the appellate courts all of the cases that pertain to the problem that we are talking about here.

ROLL: Yes.

BRADY: How many of them have been decided?

ROLL: Five. And may I say this. I talked to the Chief Justice myself, I think, about two months ago, and he said that they would give these cases priority, would bring them down just as quickly as they could, and I actually anticipate, the way they are coming down, that before the March Session of the Legislature actually convenes we will have maybe ten or twelve more cases down from the Supreme Court, and they are all carving out a lot of rules of law which the Legislature, I think, can take cognizance of.

BRADY: On Page 13 you say it is also interesting to note that the Supreme Court has under submission approximately twenty.

ROLL: That was the original number. We took, I think, twelve up from Los Angeles County. The other eight came from other parts of the State. Mr. Alexander said five; it may be six. I didn't know until last night when I got that one case from Alameda County that that one had been decided.

BRADY: How much searching of the records of the courts has been done by your office on the subject of arrest that would clarify what the rights and powers of the enforcement officers are? The reason I ask the question is this. On Pages 12 and 13 you say that the law of arrest substantially is the same, or is based on statutes wirtten in 1872, based on the Common Law and on the New York statutes of 1850, and you go on, on Page 13, very thoughtfully,

I think, to state that "a searching of the records of the reported cases of the State of California in order to determine the modern interpretations of the law", and so on. It seems to me that you are surely talking fundamentally when you wish to search the records and see what the courts have had to say. Now, the question I ask again, therefore, is just how much searching of the records has been done by your office before you came to us with these recommendations?

ROLL: If you will look at, I think it is entitled, on the back, "California Law of Arrest", you will see on Pages 1 and 2 a pitiful amount of citations. Mr. Alarcon, I think, can answer that more fully than I can.

ALARCON: When we prepared this text here - it is called "Preliminary Report - we had advising us Mr. Robert Burns of the City Attorney's office, and one of his chief functions is to defend policemen in false arrest and prosecutions, and also the City of Los Angeles, and this gentleman supplied us with a tremendous amount of preparation on the thing and cited cases which you will find in there.

BRADY: I see. On these larger sheets entitled "The California Law of Arrest". Now, the last thing that occurs to me, and this is just a statement by me and not a question, and that is that inasmuch as much of the recommendation you make is based on decisions rendered in October and November and December, 1955, and inasmuch as the Supreme Court has then approximately 15 cases still under submission, then, unless in the next sixty days an awful lot of things happen, we would certainly be jumping the gun to start in either to write statutes ourselves or to propose the Constitutional Amendment, that is spoken of latterly in your statement, to the

people, comparable, perhaps, with what the State of Michigan has.

ROLL: Well, let me say this. One of the most important things from a law enforcement standpoint - I am talking now as a prosecutor - is the law of search warrants. You look at the law of search warrants and you just can't get anything, practically, from a practical standpoint under a search warrant, and the Supreme Court is not going to change that situation because there the statute is, and something is going to have to be done in order to enlarge it and allow the officers who are investigating a matter - let me give you an example of what I am talking about. You let a murder occur in Los Angeles County, and they know who the suspect is, probably, and make an arrest in, let's say, Las Vegas. This occurs two weeks later. Say the murder happened in the man's house, his own home. He killed somebody there. Look at those search warrant statutes and see what the rights of officers are to go in there and get fingerprints and look for hairs and things of that type. I am actually worried about that situation and I think justifiably so. I know what I would tell the officers to do, and I know what Mr. Alexander would tell them to do, and I would gamble on what the courts would do. If we had a situation like that, I would say "Go in and get them", but I want that clarified. What do you think, Alec?

ALEXANDER: You have to say go in and then in hopes that the court will agree with you under the particular facts and under that particular case, but as the law exists today, you cannot say without equivocation that you have a right to go in and look for bloodstains or any evidence of the crime. You cannot say that positively today.

BRADY: Something done in the Special Session, then, or during

the Budget Session, if the Governor would open the Call a little bit, as to the law on search warrants would be of great help to you immediately, right?

ROLL: It would be of great help, not only on that evidentiary thing, but on the narcotics thing. Mr. Alarcon, I think, wanted to say something.

ALARCON: Yes, if I may. These sections that Mr. Roll is recommending to the committee deal with search warrants specifically. I can almost say that in all the 20 cases that are before the Supreme Court, none of them deals with search warrants.

BRADY: I see.

ALARCON: They all deal with situations where the officers have made an arrest and a search as an incident to the arrest, and we would like the law clarified as to search warrants because wherever possible we would like to go to a magistrate first so the private citizen may be protected with the magistrate sitting there impartially telling us you can or you can't go in there. As to those questions, the Supreme Court can't give us any help because we haven't sent any cases up on search warrants because the search warrant sections are so limited we can't get them for the things we want, evidence.

BRADY: I am still not convinced, however - of course, these things have come rather hurriedly and quickly this morning - that your statutes, as you have proposed them, are not terribly broad, but I won't make the statement until after I have had a chance to examine them more closely.

ROLL: You mean on search warrants?

BRADY: Yes, sir.

ROLL: I want them just as broad as we can get them, but I want them along constitutional lines.

BRADY: Yesterday one of the men who testified had a recommendation that when we make arrests more easy we make searches more stringent. What comment would you make on that?

ROLL: I don't know what he meant by it.

BRADY: Well, he was trying to bring the point out that in order to enable the policemen to do their jobs better, give them more power to make searches, but then restrict their rights to make arrests unless they find, I suppose, something more than they generally find to make an arrest. I have the notes written here, but I didn't read them since I made them.

ROLL: I can't comment on that. I don't follow the reasoning on it.

CHAIRMAN SMITH: Is that the American Civil Liberties Union man?

BRADY: Yes.

CHAIRMAN SMITH: Well, Ernie, I wouldn't answer the question. You didn't hear the testimony.

McGEE: Mr. Roll, in the matter of wire-tapping, we have been urged many times to enact a statute similar to that of New York, but limiting it to felonies and specifically in the narcotic field. Inasmuch as the Supreme Court has held that wire-tapping is not a violation of constitutional rights in the United States, would you think that we should do that in this State, copy the New York law, but making it more limited in its application?

ROLL: No. No. I will tell you why. I will say wire-tapping, in my opinion, can only be and should only be used in one situation and that is where the security of the United States Government is

involved, or acts of treason or sabotage. I think that the Federal Bureau of Investigation should be permitted, under federal law, to apply to a federal court, under a proper showing, and then be permitted to tap in that circumstance. Now, this that I am going to give you in connection with this question you asked is something that has been kicked around a lot. I got this out of Collier's Magazine, and I am just going to read you part of it. It has some pretty good language in it, and it is on the subject of wire-tapping:

"That eavesdropping has become a clear and present danger has been indicated by testimony of various Congressional Committees, and by certain testimony by wire-tap expert, Bernard S. Spindell, and indicates that since the development of electronics the eavesdropper is no longer dependent on crude wiring. With apparatus more ingenious than any known defense against it, the up-to-date snooper may aim a parabolic microphone . . . and record a conversation 300 yards away. There is even a more insidious device which utilizes high frequency sound waves to penetrate thick walls, and when further perfected, may be able to record supposedly private conferences in rooms half a mile away, and this without bugs or wires of any kind".

According to Mr. Spindell, not even the White House, in private talks with the President, may be considered wholly secure against modern eavesdroppers.

The growing list of some of the wiretapping abuses is frightening as the possibilities of new listening apparatus increases. In Pennsylvania and Rhode Island, wire-tapping has been used by state officials as a means of political espionage against their opponents. In Brooklyn an investigation into police blackmail of bookmaker Harry Gross revealed that some of the officers were making unauthorized wire-taps, not to apprehend criminals but to shake them down. In New York it has been testified wire-tap authorization was readily obtained by some local judges who hardly

glanced at the applications before signing them. In Washington a high-ranking cabinet officer dared not use his office telephones to confer with his advisors because he had reason to fear he was being taped by his political foes.

The problem has been summed up by Representative Seller.

"We have to weigh two basic principles, the national defense and security v. constitutional privacy. One must not yield to the other. Wire-tapping may well be essential to protecting national security against espionage and treason. If used in any situation, the Legislature and the Congress must set up protective measures against the kind of local forgeries which experts have shown to be possible".

Now this is a very dangerous thing. I have answered no and have tried to explain my answer. I will go this far and not be facetious when I say it, but did you ever stop to think why the modern curtain was invented? We like some privacy. The general public, I think, likes some privacy.

CHAIRMAN SMITH: Ernie, we are running late, but I do want to ask you three or four questions here. On Page 3 and Page 4 you mention these five cases that were dismissed in the preliminaries, or before the municipal court, that you subsequently have indicted. What has been the result of those cases? Are they pending?

ROLL: I think there are three of them still pending, and we lost one, and I think we convicted on the other one. That is my recollection.

CHAIRMAN SMITH: Now, in changing the law on the search warrants here with particular emphasis on helping in the narcotics cases, in the average type of narcotic case of a sale, or even a possession, do you feel that even if the law of search warrants

were changed, would we have ample time with which to get a search warrant in the average narcotic case?

ROLL: Let me say this. Insofar as sale is concerned, unless you are looking for what the officers call a "stash", narcotic sales are usually made to informants and to officers acting as informants. You have there direct evidence of a sale, and I don't think you have to worry too much insofar as sales are concerned and search warrants.

CHAIRMAN SMITH: Possession then?

ROLL: I think search warrants would be a help in certain types of cases, yes. However, if the officers have a reasonable cause to make an arrest, as an incident to that arrest, if it is a legal arrest, they have a right to search, and if they arrest the person in the house, they can search the premises.

CHAIRMAN SMITH: Now, on Page 12, in your suggest change of language to Section 1525a, this affidavit is going to be obtained, "the person signing the affidavit, from a reliable informant". As a suggestion, do you think it would be better to word it to the effect that based upon reliable information, or based upon information from a source believed to be reliable?

ROLL: I think that is correct. Yes, I think you are right.

CHAIRMAN SMITH: You can't go in there and prove all of your informants are reliable. Your affidavit is dead if you have to convince every magistrate of that.

ROLL: My thought in putting that in there was when the officer came in, under that situation, and if he told the court that he had an informant and he believed the informant to be a reliable informant, that is, take the word of the officer that

the informant is absolutely reliable.

CHAIRMAN SMITH: You would have no objection to some change in that particular type of language.

ROLL. Oh, no. The more you open that up the better I feel about it.

CHAIRMAN SMITH: Now, on your proposed draft here on the change in the laws of arrest, it is my understanding that you feel there are certain changes that will still have to be made, based upon decisions that may come down and from the committee which you have with the Attorney General. When can this committee expect a decision from this committee? The Session comes to order March 5th, and I am wondering whether you anticipate it before that time.

ALARCON: Yes, we could have a report before that time.

CHAIRMAN SMITH: In other words, I am certain that this committee, if they asked the Governor to open the Call to change the laws of arrest, would want to have at least 99 and 99/100 per cent agreement of all law enforcement agencies, judges, and the others to ask the Governor to open the Call and try and pass legislation. We will not have time in the March Session to argue the laws of arrest back and forth and go through hearings, so we would have to have something very concerted on it. Do you anticipate we might look forward to that?

ALARCON: Yes, I think we could give you a report in which there would be agreement before that time.

CHAIRMAN SMITH: Now, on Page 14, regarding your motion to suppress, I notice you didn't set forth any time that you thought might be reasonable on that. Do you have any suggestions along that line?

ROLL: Well, I haven't gone into that. I thought I would leave it open because it hasn't been discussed with the other law enforcement agencies. It is primarily a prosecutor's question, but the thing we don't like is to get into court and for the first time have an objection made to the evidence. We want a motion made to suppress at a time before we get into court so we will know what we are confronted with.

CHAIRMAN SMITH: Will we expect a suggestion on that time?

ROLL: Yes, I think you can.

CHAIRMAN SMITH: What are we talking about, two weeks, three weeks, or a certain time after plea, or what?

ALARCON: We don't want to make this thing too rigid because some clients don't tell their defense attorneys everything they should tell them, and it may develop that the defense attorney doesn't know about this until the time of the trial; so we don't want to make it too rigid, but we would like to have some reasonable time prior to the time of the trial, and perhaps the same time as the time for the motion on 995, assuming that the defense attorney knows it.

CHAIRMAN SMITH: On Page 16 where we are talking about these dictagraphs, I suppose when we mention the State Narcotic and Drug Act we would probably have to spell that out to Health and Safety Code. It would be more legal.

In talking about these microphones installed in dwelling houses and the like by means of trespass, do we include in that, for instance, a conversation in a bar, an automobile, or recording equipment on an investigator from an office? Is that what you call trespass?

ROLL: No. No.

CHAIRMAN SMITH: That would be permissible to use before the Grand Jury or to talk to the individual on it?

ROLL: Absolutely. In other words, I am going on both the Irvine case and on the Cahan decision where they say . . .

CHAIRMAN SMITH: The breaking and the entering . . .

ROLL: That is right, by means of trespass. When someone trespasses in a home or a house and installs a microphone, that is in violation of certain constitutional guarantees, and the courts have so construed it. There are a lot of cases on it.

CHAIRMAN SMITH: Now, on this Michigan law regarding narcotics as made as a suggestion for our consideration, do any of you gentlemen have any opinion as to whether or not the Legislature should actually offer such a bill as waiving the exclusionary rule in narcotics?

ROLL: We merely pointed it out as a suggestion. I am not recommending it. You will note in there I said I don't know what the Supreme Court would do with it if they passed it - I mean the Supreme Court of the United States.

CHAIRMAN SMITH: Do you have any idea how it has worked in Michigan? I don't.

ROLL: I don't.

CHAIRMAN SMITH: Is your committee studying whether or not they will make a recommendation on that specifically?

ROLL: Well, the part I have been given is on the law of arrests and some portion on search warrants. That is the only part I have been given.

CHAIRMAN SMITH: Well, I repeat that this committee has always

come to pretty much of an agreement before we have offered any laws on narcotics or sex or other changes in the past, and we don't want to offer the law unless we feel that it is pretty well uniformly backed by all those who are interested in it because all we can do is pass them. We can't enforce them, and if we can pass any laws which can help you in law enforcement, we are all willing to do it.

ROLL: Well, Mr. Smith, we, and I think all the agencies will agree with me, have different problems in Los Angeles. We can compare with San Francisco and the larger communities. Take some of the cow counties - they have problems entirely different from ours, and I am not saying that in derogation. There are some great people in the cow counties, but I don't know whether you are going to get some of the cow counties to agree with the larger departments.

CHAIRMAN SMITH: We face that problem on every issue, law enforcement and others. Now, Mr. Roll, your office has done a lot of work, and the committee is indebted to you for presenting this information to us. It is necessary for us to take a five-minute recess, and then we will carry on.

BRADY: One word of caution, Mr. Chairman. I might suggest to Mr. Alarcon, or whoever is doing the particularized work on the changes in the statutes, try to get them even before the session begins because we not only must have agreement among those in law enforcement, but the opposition that was rather vocal yesterday will be belting them around in Sacramento during the Budget Session if we don't have them agree, too, in part.

ROLL: I have tried to answer all your questions. Is this Assemblyman a lawyer?

CHAIRMAN SMITH: Brady is our people's lawyer on the committee. We call him the people's lawyer, and he does a remarkable job representing the people.

ROLL: Well, let me just spell out something I heard the other day. Maybe you would appreciate it. We have a legal reference organization in the Los Angeles Bar Association and, so the story goes, a man showed up the other day and wanted a lawyer. He explained that he had considerable business, he had had a lot of lawyers, and he wanted a man along certain lines, but there was one qualification that he wanted above everything else and that was a one-armed lawyer. The person attending him said "That is the most peculiar request I have ever heard. Why do you want a one-armed lawyer?" The man said "Well, I will tell you. Everytime I go to a lawyer and ask a question he says on the one hand it's this way and on the other hand it's that way, and I want a man with one hand and then I will get one answer".

RECESS

CHAIRMAN SMITH: All right, let's go, gentlemen. The next witness is William H. Parker, Chief of Police of the City of Los Angeles.

CHIEF PARKER: Mr. Chairman and members of the committee, I come up to express to the committee my appreciation for the opportunity of appearing before it today and to attempt to present to you, in the question that is before the committee, the attitude and experience of the law enforcement agencies, primarily the Los Angeles Police Department.

Before I go into my prepared statement, I believe it is incumbent upon me, in view of the testimony that was given by the

District Attorney of Los Angeles County so that there will be no doubt in your mind and so it will not be necessary to develop it as we go along that there are some very sharp differences of opinion in many areas in the question of exclusionary rule, wire-tapping, and so forth, between the District Attorney and myself.

I would like to take this opportunity to rebut the statement in connection with statistics made by the District Attorney. First, the statistics that he gave to you from the Attorney General's report cover only the first six months of 1955, and you gentlemen well remember by now that the Cahan decision did not come down until shortly prior to May 1st of 1955, so that report represents experience of four months of the six reported that had nothing to do with the effect of the Cahan decision.

I believe that I should also clarify apparently some misconception of the film that was shown yesterday. It is true that in the film, as indicated by the District Attorney, that the arrest should be made first, and then should be followed by a lawful search. Since then the Supreme Court has ruled that it does not make any difference whether the search precedes or follows the arrest as long as there was probable cause for the arrest at the time the search was made. But you gentlemen will remember in the film it was pointed out by the officers that they did not have probable cause, as such, in terms of the interpretation of the court to make an arrest on the information they had. I caught that technical error at the time I saw the rushes on the film, but because of the subsequent statements of the officers, I did not believe it was material enough to request that they make any change in it.

I think it is extremely important that you have the viewpoint of the workers in the vineyard, as I might call them, the man who must come up against this crime problem in the field. The District Attorney mentioned to you that he had sought advice from the Attorney General as a result of the Cahan decision, but what he did not tell you is that the main question, as I recall it, in his request to the Attorney General was as to the liability of the District Attorney in the event that he should prosecute an action based on evidence seized in contravention to the exclusionary rule. Well, of course, he got the opinion that all of us expected he would, that the prosecutors of the courts are immune to civil redress by judicial decree, leaving the only facet of law enforcement that faces the question of civil redress the police officer. He did bring out one point that I think is important and wasn't mentioned before, that in addition to the other safeguards against unwarranted police activity, there is Section 242 of Title 18, United States Code, known as the Civil Rights Act. That is the Section that was referred to when the Supreme Court of the United States, in the case of People v. Irvine, suggested the Attorney General should look into the facts to determine whether that Section had been violated. So that is just one more remedy that the person whose constitutional guarantees may have been violated has available to him.

I think that the headline in the Los Angeles EXAMINER in last night's edition, is extremely important at this time, "Dope Crazy Youths Attack, Stab Playground Directors". Three playground directors from the Evergreen Playground are in the hospital today because seven dope-crazed youths attacked them while they were attempting to supervise a gathering of 150 people in the playground.

In that same connection, I stated at a meeting yesterday in Judge McKesson's court that in the City of Los Angeles juvenile narcotic arrests increased 68 per cent during 1955 over 1954, and during 1955 we found it necessary to arrest 628 juveniles for narcotic offenses. Now, does that sound like all is well as some of the witnesses would have you believe? As I dwell upon this situation, I am somewhat reminded of an infamous emperor of ancient Rome who played "Hearts and Flowers" on a violin while the city was consumed by a conflagration.

I would like to call the attention of the committee to the January issue of Reader's Digest, Page 49 thereof, which contains a condensation of an article written by John Barker Waite, retired University of Michigan law professor and former editor of Michigan Law Review, when he asked the question "Why do our courts protect criminals?" The article is short; I will not read anything but the last paragraph, and this is what this learned and experienced professor of law has had to say in his closing paragraph:

"How are we to halt this travesty on justice, make the guilty pay for their crimes, and bolster the public's safety? One way would be for the informed and incensed public, through letters and telegrams, through the pulpit and the press, through public forums, radio, and television to cry out against each and every miscarriage of justice and against every criminal turned loose on a mere flyspeck of technicality.

"An outpouring of indignation sooner or later would be heard by the courts despite their paper buttresses of precedent, and they would cease to encourage criminals and criminality at the expense of public safety, public decency, and public good".

In that same connection, in Volume 54 of the December 1955 issue of the Michigan Law Review, No. 2, "Judges of the Crime Burden" by the same author - and I urge that the committee give

their attention to what he has to say in this article written in a more technical vein for the Michigan Law Review.

One other question before I get into the prepared text, and that is on the question of search warrants. The information that we have been given from the office of the District Attorney is that in order to obtain a search warrant we must present to him the same degree of evidence that would justify the municipal court holding a man accused of a felony offense for trial in the superior court. Now, it occurs to us that when we have that much evidence we probably don't need a search warrant because there is enough evidence to proceed against the individual. In the last conviction of Charles Cahan on bookmaking, an application to the District Attorney's office for a search warrant was denied, but we were able to lawfully, in the current sense of the word, obtain the evidence that existed and convict him of the crime.

Going to the text, the Supreme Court of California, in a four to three decision on April 27, 1955, in the case of People v. Cahan, imposed the exclusionary evidence rule of evidence upon the courts of this State. The decision is contained on page 17 of the opinion and is as follows:

"Despite the persuasive force of the foregoing arguments, we have concluded, as Justice Carter and Justice Schauer have consistently maintained, that evidence obtained in violation of the constitutional guarantees is inadmissible. People v. LeDoux, 155 Cal. 535, People v. Mayen, 188 Cal. 237, and the cases based thereon are therefore overruled."

The effect of this decision has been catastrophic as far as efficient law enforcement is concerned. Subsequent events have more than justified the warning sounded by Justice Spence in his dissent when he said:

"The experience of the federal courts in attempting to apply the exclusionary rule does not appear to commend its adoption elsewhere. The spectacle of an obviously guilty defendant obtaining a favorable ruling by a court upon a motion to suppress evidence or upon an objection to evidence, and thereby, in effect, obtaining immunity from any successful prosecution of the charge against him, is a picture which has been too often seen in the federal practice. In speaking of an obviously guilty defendant, I refer by way of example to one from whose home has been taken large quantities of contraband, consisting of narcotics or other commodities, the very possession of which constitutes a serious violation of the law. The above-mentioned result, however, is the inevitable consequence of the application of the federal exclusionary rule in those cases in which it may be ultimately determined that a search or seizure has been made illegally, either because of the absence of a search warrant or because of some technical defect in the affidavit upon which the warrant is based".

Both as a lawyer and a peace officer, it is my solemn duty to observe and respect constitutional guarantees, and I will never be consciously guilty of advocating the flaunting of constitutional safeguards. It is my contention, however, that many searches and seizures branded as "unreasonable" by the courts are in fact reasonable under attendant circumstances and do not violate the purpose and intent of the Fourth Amendment of the United States Constitution. It is further urged that the true unreasonableness of the situation lies in the insurmountable handicaps placed upon the police.

In People v. Cahan the court made no attempt to define the areas in which a police officer might properly search for and seize evidence. In fact, the confusion created by the decision was further magnified by the following language appearing in the majority opinion:

"We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into

the law of criminal procedure. The validity of this contention need not be considered now. Even if it is assumed that it is meritorious, it does not follow that the exclusionary rule should be rejected. In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them".

In the vast majority of cases the machinery of law enforcement is activated by the affirmative exercise of the powers and duties of a police officer. Yet the lowly police officer is told, in effect, that his actions will be justified or condemned in a piecemeal fashion as the facts of each particular case come before a high court of this State. It is my contention that this is an unfair burden to place upon those whose sole objective is the protection of the people against the vast predatory criminal army that exists in this country today. At this point it might be well to remember that the police officer is civilly liable for any tortious act he may commit in the performance of his duties while the courts and prosecutors have been granted immunity by judicial decree.

Since the Cahan case we have watched with interest the decisions of our Supreme Court dealing with the exclusionary rule. It now appears that the Court will approve the introduction of evidence seized without a warrant only when the officer had probable cause to effect an arrest and that whether the search is conducted before or after the arrest is immaterial. The question of what constitutes probable cause is a question of fact to be determined in retrospect and does not necessarily depend upon the state of mind of the officer at the time of the search and/or

arrest. Authority to search the person is apparently limited to the individual for which there is probable cause to subject to arrest and does not include companions that may be with him. In a recent local case, an officer observed a speeding motorist. Upon being overtaken, the motorist stopped his vehicle at the curb. The officer observed two male passengers and a typewriter in the rear seat of the vehicle. He inquired as to the ownership of the typewriter and ownership was claimed by one of the passengers. This person was subjected to search, and a quantity of heroin was taken from his person. It was later determined that the typewriter had been stolen in Bakersfield and was the subject of an all points bulletin. At the preliminary hearing, the evidence was excluded and the charges were dismissed. The court concluded that while the officer was justified in arresting the motorist for speeding, he had no probable cause to believe the passengers had committed a criminal offense, and therefore the search of the defendant was unreasonable.

This premise seems to have been sustained by our Supreme Court in its decision in the case of People v. Charles A. Simon handed down November 29, 1955. In this case a San Diego police officer observed two young men enter and leave a warehouse district about 10:40 p.m. The defendant's companion, a minor, was found to be in possession of alcoholic liquor, and the officer then proceeded to search the defendant and took from his person a marijuana cigarette. The court held this search to be unreasonable on the basis that the officer did not have probable cause for the arrest at the time the search was conducted. In the opinion in this case, the court made the following observation:

"Even if it was conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be justified".

This statement leads me to inquire as to the proper course of action for the officer to pursue in the event a concealed firearm were found on the person searched and for which he had no permit to lawfully carry the weapon. No successful prosecution would lie if the officer lacked probable cause to make an arrest at the time the search was conducted. Could the officer seize the weapon if it was the personal property of the person searched? Sometimes I wonder if we are not launching into a sea of hypothetical abstracts. It appears to many of us in the law enforcement field that our ability to prevent the commission of crimes has been greatly diminished. The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute "probable cause" for an actual arrest.

In contradistinction to the San Diego case, I invite your attention to a recent local incident wherein an alert officer effected the arrest of the suspects shortly after an armed robbery had been committed. On Monday, December 5, 1955, while on routine patrol, an officer of this department observed two men in an automobile being operated on Wilshire Boulevard. The general appearance of the men and the car and the slight bend in the license plate aroused the officer's curiosity. After causing the car to be halted, he searched the vehicle and recovered two toy guns and the loot of an \$18,000 robbery that had occurred about four minutes before.

The officer's actions in this case were roundly applauded by a grateful public. In retrospect would this case stand the test of "probable cause"? The officer was unaware of the robbery until after the apprehension of the suspects. True, the license plate was bent, but does probable cause depend upon the degree of the bend? A similar situation is found in the recent decision handed down by our Supreme Court in the case of People v. Beverly Michael. The officer contended that they were voluntarily admitted to the premises, and the evidence was voluntarily handed to them. The defense contended that the presence of four officers constituted such a show of force that the admission to the premises and the surrender of the evidence were involuntary. In its opinion, the dilemma of the police is highlighted when the court said " . . . the cases that have determined this question under varying factual circumstances are difficult, if not impossible, to reconcile . . . " Also in its opinion the court stated, "We are not unmindful of the fact that the appearance of four officers at the door may be a disturbing experience, and that a request to enter made to a distraught or timid woman might, under certain circumstances, carry with it an implied assertion of authority that the occupant should not be expected to resist". From this statement it might appear that the number of officers seeking voluntary admittance to premises in criminal investigations should be gauged by the timidity of the occupant if such could be determined in advance.

Tremendous strides have been made from within the field of law enforcement to upgrade the police service. One of the greatest hurdles is the tendency of many courts to separate the government, the people, and the police into three separate alien camps.

Lincoln referred to a government "of the people, for the people, and by the people". The police are the servants of the people, and it is contrary to public welfare to so hamper the police in the conscientious performance of their duties through the gratuitous imposition of the exclusionary rule that the question of the conduct of the officer in obtaining evidence is paramount to the question of the guilt of the defendant. Quoting from Page 9 of the Cahan decision, "'the federal exclusionary rule,' in the words of Mr. Justice Black, 'is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.'"

It is conceivable that the imposition of the exclusionary rule has rendered the people powerless to adequately protect themselves against the criminal army. According to the statistics released by the Federal Bureau of Investigation, crime increased in the United States during the period 1950-1954 at four times the rate of the population increase. Even the proponents of the rule will not deny that its application will result in the freeing of some criminals that would otherwise be punished. In this connection, I believe the time has come to take a hard look at the results of the Cahan decision upon the crime picture in this city.

During the first quarter of 1955, selected major felony offenses (those offenses that constitute the most accurate crime barometer) decreased fifteen per cent over the same period in 1954. With the advent of the imposition of the exclusionary rule on April 27, 1955, there was a progressive diminishment in the crime decrease with the result that at the end of the year the decrease over 1954 was less than four per cent. This situation

cannot be blamed upon any lack of diligence upon the part of the police for the total arrests during 1955 increased more than twelve per cent over 1954. Your attention is invited to Appendix A of this report entitled "Crime Trends". You will note that the Los Angeles crime experience during the first four months of 1955 - and may I point out the broken red line represents the five-year average in the crimes of robbery, burglary, burglary and theft from auto, auto theft. The purple line, broken, represents the 1954 experience. During the first four months of 1955, our experience followed precisely the crime experience on the five-year average, and was considerably below the crime experience in those categories during 1954. Now, this is where the Cahan decision comes in, right here. This is April. This is the first figure in for the month of May. This is the first month following the Cahan decision - precisely followed the five-year average and was appreciably below the 1954 experience. There was a departure from the trend of an accelerating nature with such a skyrocketing effect that December, 1955, reflected the worst crime experience in the history of Los Angeles. Now I ask you gentlemen, is that the situation that these witnesses are satisfied with? The worst month in the history of the City of Los Angeles, as far as crimes committed are concerned. It is interesting to watch this chart, and I defy any of the critics of statistics to tear it apart. As the criminal army became familiar with the new safeguards provided to them, the acceleration in crime was an inevitable result.

A projection of the trend existing at the time of the Cahan decision, compared with the actual experience during the period from May 1, 1955 to the end of the year, reveals the following

number of crimes in Part I Property Offenses committed that would not have been committed if the trend had remained constant. In other words, if we had been able to maintain the trend that existed back in 1953 up into the close of April, 1955, these offenses that actually occurred in the City of Los Angeles would not have been committed. Now, we are talking about this period from May 1st through December: Robberies, 481. That is an increase of 31.7 per cent above the trend; burglaries, 1,403, an increase of 13.9 per cent above the trend; larceny, 2,580, an increase of 11.5 per cent above the trend, auto theft, 1,250, an increase of 30.9 per cent above the trend. There were 5,714 offenses in those four categories alone that would not have occurred if the trend had continued.

It is entirely probably probable that these 5,714 crimes would not have occurred if the underworld had not been aided by the exclusionary rule.

The trends in the prison population of this State bear further evidence of a changing condition that can be attributed to the handicaps placed upon law enforcement by the imposition of the exclusionary rule. Since 1944 the California prison population has steadily increased with the exception of one or two months during the Korean conflict. The monthly increase has ranged from 8 - 10 to 200. The population of the state prison system reached an all time high in March, 1955 with a count of 15,668. It was estimated by prison officials that the count at the end of 1955 would total about 16,020. The trend reversed itself, and at the close of 1955 the population count was about 15,230. Thus, there are more than 790 fewer persons in our state prisons today

than were anticipated by the prison authorities. Who can refute the fact that the change in the rules of evidence in criminal cases in California may have resulted in more than 790 criminals at large to prey upon the people of this State that would otherwise be serving sentences in a state prison. To digress a moment, I have no figures on the amount of people who would have been in county jails if it had not been for the Cahan decision.

A further evidence of the severe blow dealt to efficient law enforcement under the exclusionary rule is contained in Appendix B to this report. The average monthly arrests for certain offenses during 1955, before and after the Cahan decision, are set forth in the table. In order to refute the spurious claim that these are seasonal changes, the identical comparisons for the year 1954 are enumerated. The most significant figure in this table is in the field of narcotic arrests. During 1954, comparing the two periods before and after Cahan, reflected a 15.7 per cent in narcotic arrests while in 1955, comparing before and after Cahan, there was a 4.5 per cent decrease following the Cahan decision. When it is considered that many authorities in the field of law enforcement estimate that narcotics play a part in fifty per cent of all major criminal offenses, the significance of this decrease in narcotic arrests is, in itself, an indictment of the exclusionary rule.

Another great state of this country, as a result of an unhappy experience with the exclusionary rule, took affirmative action to modify it in a manner that might well be emulated by the Legislature of California. By popular vote, first in 1935 and again in 1952, the people of the State of Michigan amended Section

10 of their Constitution to prohibit the barring of evidence in criminal proceedings when the evidence consists of dangerous weapons or narcotics seized by a peace officer outside the curtilage of any dwelling house in the State, and may I pause to point out that the District Attorney left the word dwelling out when he cited this rule to you. It is dwelling house.

The text of this section in its present form is as follows:

"SEARCHES AND SEIZURE; drugs, weapons, admissibility of evidence. SEC. 10. The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause supported by oath or affirmation: Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, (any narcotic drug or drugs,) any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slingshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state."

Now, to digress again, as I read that I would suggest that you mentally apply it to these cases that have recently come down from the Supreme Court dealing with searches that occurred, not in dwelling houses, but on the public streets.

If the exclusionary rule "is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate" as stated by Mr. Justice Black, then does it not necessarily follow that the Supreme Court of California created a judicial rule of evidence in the Cahan decision which the California Legislature might negate. The creation of rules of evidence is the historic responsibility of the legislative branch of government, and some believe that the usurpation

of this power by the courts is an intrusion upon the legislative function. There appears in Volume 45, No. 6, March - April, 1955, edition of "The Journal of Criminal Law, Criminology and Police Science", published for Northwestern University School of Law, an article by John L. Flynn, Editor, entitled "The State Exclusionary Rule as a Deterrent Against Unreasonable Search and Seizure". In this article the following statement appears:

"Justification for the rule demands a choice between individual and public security. Some difficulty in law enforcement is the price which must admittedly be paid for the right of privacy. To justify its continuance and extension, therefore, the rule must be shown to be more beneficial to the individual than it is harmful to society".

The statistical history of crime in Los Angeles since the imposition of the exclusionary rule clearly demonstrates that it is more harmful to society than it is beneficial to the individual. Therefore, the continuation of the rule is unjustified and immediate legislative remedy is in order. While the complete abolition of the rule through legislative action is justified, it is my considered opinion that the least the Legislature of the State of California should do is to enact the rule of law contained in Section 10 of the Constitution of the State of Michigan.

I would like to add one other thing not in the text. Do you believe that in the month of December, for example, in which this figure here represents the commission of 5,029 crimes in the field of robberies, burglaries, burglary theft from motor vehicles, and auto theft, that the people who have been the victims of over 5,000 crimes that in my opinion would not have occurred in the City of Los Angeles if it had not been for the exclusionary rule, would far over-balance the number of nameless, unidentified

individuals who have been paraded before this committee whose privacy was allegedly violated?

Thank you, gentlemen.

CHAIRMAN SMITH: Are there any questions of Chief Parker?
Mr. Brady?

BRADY: Well, just a couple. Chief, from your vehemence would you say that there was a complete breakdown of law enforcement in the months of November and December of last year?

CHIEF PARKER: There was a breakdown in law enforcement, Mr. Brady, not from the number of people we had in the jails of the City of Los Angeles, not from the number of arrests made by the police, but the breakdown in law enforcement is the inability of the police, under the exclusionary rule, to successfully bring criminals to the bar of justice. Yes, I would say definitely there is a breakdown, and if this continues, the point that I am trying to make crystal clear, it would be the most unfair thing in the world for anyone to blame the local police for this rise in crime, but the blame should be put where it belongs, into the high court of this State, those prosecutors who support this exclusionary rule, and any Legislature which fails to take action against it.

BRADY: Your position is different, I take it, from the position of the Director of Narcotic Law Enforcement, Mr. Creighton, who told us yesterday that even after the two or three months drought after the Cahan decision - and in that two or three months he had a great deal of difficulty pursuing his normal course - that currently the State Division of Narcotic Law Enforcement is having about the same number of cases. Now, it is strange that Mr. Creighton would have that success whereas you are . . .

CHIEF PARKER: Well, I would like to see his statistics. After all, I think he was speaking for the Attorney General, if you want my opinion, who didn't appear here. There is a federal narcotic man who is going to testify here. Let's see what he has to say.

BRADY: What would you say is the tremendous difference, or what is the cause why the crime was apparently so much greater in 1954 than it was in 1955?

CHIEF PARKER: Well, because there are several things. We got into a trend in 1953 which was a downward trend and is not depicted on this chart, but the statisticians who follow these trends in cycles said we have started a downward trend in a particular cycle - it might be 1953, and we begin to get two things; the full effect of the downward trend, because you will notice, on the purple line, it drops way down here in December of 1954. We pick it up at the same level in January of 1955, and then we continue the downward trend until we get to this point. Of course, another reason that we were able to do a better job is because this new police department that we have, the vast majority of which just came to us subsequent to World War II, are beginning to be experienced and efficient police officers; so it is a combination of factors, the downward trend within the cycle and an increase in the efficiency of law enforcement. We were doing a magnificent job up to this point, and then something disturbed it, and there is no other factor, unless it is some possible increase in population, that could begin to explain the difference, but in addition to the increase in population, there is no other single factor, or there is no other factor, I might say, that anyone can

point to to explain the sudden departure from the trend with the skyrocketing effect up here while the police are still making twelve per cent more arrests than they did the year before. Remember this. It is well enough for the prosecutor to talk about how many convictions he obtained, but he doesn't have to issue a complaint unless he wants to, and the very fact that the police of this City face their job with a professional attitude has caused them to re-examine everything they have been doing in an attempt to fit into the ill-defined rule laid down by the Supreme Court because they want to obey the law. The result of it is that they are just a little bit afraid to step in and do the things that they, in their own opinion, are justified in their reasoning.

There is one other thing I must leave with this committee. It is a coincidence, I appreciate, but one of the basic, ultimate aims of the Communist Party is to drive the police of America into a state of inaction due to fear. Be careful that in playing with these niceties and technicalities that we are not playing into the hands of the Communist Party, because that is one of their tenets; that is what caused the fall of Germany, the fear of the police. I could go into great length on my own experience in that regard in Europe. When the police are driven into a shallow fear, God help the people.

BRADY: How many more hundreds of thousands of people are in your jurisdiction since the five years that you speak of in your average?

CHIEF PARKER: Well, for this five-year average, 1950 through 1955 . . .

BRADY: Well, how many more?

CHIEF PARKER: Our population increases in the city at the rate of about fifty thousand a year.

BRADY: Not more than that?

CHIEF PARKER: That is just about it. If you are interested in the whole area, the county increases at a greater rate, and we have to police a lot of the people who pass through here who don't live in the City of Los Angeles; but the actual population of the city has been increasing during that period at the rate of about fifty thousand a year, and it might also be of interest to you to know that we have fifty less policemen in the City of Los Angeles today than we had on this force when I became chief five and a half years ago.

BRADY: That must be the City Council's affair, not ours.

CHIEF PARKER: Oh, no. We have the money and we have the jobs, but we can't find the people that fit the jobs, that are competent to perform.

BRADY: When did you first begin to get your shortage of help?

CHIEF PARKER: Well, of course, the department depleted appreciably during the war, and then we had to recruit tremendously after the war, and as these men came back out of the service, we had some success, but then as the years went along, they became settled in other employment, so we don't have an avalanche of people being released from an occupation looking for something to do. It is this very situation in which the courts talk about the blackmailer, the busybody, and the police, which our Supreme Court has done, that drives people into some occupation that has more social standing and more dignity. They don't like to be the mat for the vehemence of the other elements of law enforcement

who have found a popular whipping boy.

BRADY: Well, Mr. Crittenden touched on that this morning when he said that he figures that both the district attorneys and the police departments have been doing their jobs as best they could, and he also said that he figured the legislative bodies had been most responsive whenever they were called upon - that is why we are here in fact - so I can imagine we are all striving toward the same goal, but the only thing that puzzles me, just using your own remarks there, that you have a quarter of a million more people in the latest five years in Los Angeles City itself - you perhaps have a million more in the county, or in the neighborhood of that - and you are fifty men short in the department, so I cannot agree with you that the five thousand crime trend incidence there is totally dependent on just exactly the way you have portrayed it.

CHIEF PARKER: What you are overlooking - you are not properly interpreting the five-year trend - is we are not talking about what happened between 1950 and 1955. We are talking about what happened between the close of April, 1955 and the close of December, 1955. All of these things you are injecting into it cannot be distorted into a factor which would influence that change. Now, there might be some appreciable influence if we will take the year and we will take two-thirds of it and divide it into fifty thousand, and it may be that we got a matter of around thirty thousand additional people in the City of Los Angeles in that period of time, but that thirty thousand additional inhabitants, unless all of them are criminals, certainly couldn't have resulted in this sharp breakaway from the five-year trend to the skyrocket up here. What refutes what you are trying to say is the fact that in the face of

a great increase in population in the five-year period, we did reduce crime appreciably below 1954 and in the first four months of 1955.

BRADY: Yes, but then just using your own remarks that the population could not be the reason for the great increase, it would also argue, then, that there was no reason why you were not able to keep the crime down to where the five-year average shows there on your chart, because from what you show on your chart in 1955 and in 1954, I would say that there must have been a great deal less crime in 1951, 1952, and 1953 than there was in 1954 and 1955. Now, what happened in the year 1952 that would give you such a wonderful downward trend there?

CHIEF PARKER: Oh, I can get the charts for you and show you that there was an ascendancy after the war that reached a certain point, and then we started through a cycle, and this cycle has been projected on a scientific basis, and with the decrease that followed the peak in about 1952 we began to get this decrease in crime and were going along in the cycle, and then something happened here to disturb it. Now, maybe I am all wrong. Maybe you know what it is that happened in there. I can't find any other factor, but something did. We have expert statisticians, not from the standpoint of computing facts, but scientifically approaching the problem, because that is the way we must gauge our activities. Another thing we must remember, as I pointed out at the end of 1955 when the crime statistics were issued, that the individual police officer in Los Angeles worked harder in 1955 than any time during the history of the city. They made over 200,000 physical arrests; they issued 1,117,000 traffic citations, so that with the same amount of men, in those fields where you measure police activity,

there were greater contacts made with the people in the community, there were more arrests, more citations, more everything done, more individual production; so the lack of manpower has been compensated for by some replacements with clerical and technical personnel to get more policemen out into the street, refinements in organization, refinements in procedures, experience, and education. We have 1,400 members of this group of people who are so condemned and damned by those above us who are, on their own time, going to colleges and universities in this area. And may I say this, Mr. Brady, that it is the only governmental job I know of where you have to pass a psychiatrist before you can be employed. That is the situation in Los Angeles today; if you don't get by the psychiatrist, you are out.

BRADY: Well, that is probably the reason. It would be partially your doing, no doubt, that psychiatry should enter into the choice of men, because I have seen it reported in other parts of the State that the Chief of Police of Los Angeles and his department were doing a magnificent job and, among other things, were compelling or demanding that the applicants take a psychiatric examination.

CHIEF PARKER: It is impressive . . .

BRADY: Well, then, don't laugh at the idea that you must have been partially the harbinger of or the creator of.

CHIEF PARKER: No, I am not laughing at the idea. I am pointing out how carefully selected these men are that have been, by some of the witnesses here, relegated, apparently, into a group of unconstitutional, autocratic individuals who have no desire to do anything but oppress people. They have read the Constitution;

they are just as patriotic as anyone in the prosecutor's office or on any bench in this land. They have only one interest. They have only one mission, to protect the law-abiding people of the community against the criminal army. Now, don't take my statistics. Go to the F.B.I. They will tell you about the crime increasing four times the rate of the population from 1950 through 1954. What I am trying to say to this committee, to the public, so that the public can know what their situation is, that this sort of gratuitous adoption of the rule - and the court said "we don't have to do it, but we are going to discipline the police because we don't like the way ther work" - but this gratuitous imposition of exclusionary rule can only result in two things. It will make it easier for the criminal to prey upon society and more law-abiding people by the thousands, and countless thousands will be victims of this criminal army, and the criminal army is just as dangerous to the national security of this country as the Communist or Russia. The people are losing the ability to protect themselves; they depend upon the police because it is the local police service that in the ultimate stands between the law-abiding people of the community and the criminal army. It isn't the F.B.I.; it isn't the national narcotics bureau. The F.B.I. has a few offenses that they are concerned with. They can spend three years on an investigation, but go up in this detective bureau and look at the number of assignments that are handed to a man when he reports for duty in the morning, and the next morning another batch of assignments.

It is said, "Well, they get along with it at the federal level". They don't. If they tell you the truth, they will tell you it

doesn't work at the federal level, but in the ultimate it is the police officer on the street in the community that is a dam between the criminal and the law-abiding citizen. Now, even on this wire-tapping thing, which I don't want to get into because you have heard enough from me on that in Sacramento, but will just point out that the Assistant Attorney General of the United States, in a speech in New Orleans, Louisiana to the I.C.P., advocated legalized wire-tapping on the state as well as the federal level.

BRADY: Well, of course, we can't get into all things, as you have said, and . . .

CHIEF PARKER: No. Well, I didn't bring that into it, and I am only bringing one point to this committee.

BRADY: Pardon me just a minute. From your vehemence, again, let me say I don't represent the criminal army. I am down here in order to try and help the police department of the City of San Francisco, as well as the police departments in the rest of the State of California, and the criminal army I am very vehemently opposed to, just as you are, I take it, but let me just ask one question in conclusion, Chief, and that is this. On a couple of occasions in the fifteen years I have served in the Legislature, I have been stopped by policemen who have inquired, rather vehemently, what was the big idea of defacing my license plate by painting it a color different from the regular colors. Now, should one of them have stopped me on Wilshire Boulevard, would he be entitled to say, "All right, now, you and the lady step out. I want to search the car".

CHIEF PARKER: Because you had an "A" or an "S" on your license plate?

BRADY: Yes.

CHIEF PARKER: Well, I tried to remedy that. You and I talked about that in Sacramento several years ago. When I came back I had a bulletin put out to the police department with pictures of those plates. You see, there is only one "S" plate in the County of Los Angeles, and they don't get to see that very often, so that was something unusual when it appeared before them, but we did put out a bulletin so that they would be familiar with the "A" plate. That is a result of our conversation in Sacramento at the Senator Hotel.

BRADY: The reason I mention our own license plate is to try to be rather general rather than pick on the policeman who saw the bent license plate on Wilshire Boulevard. Now, just as in the Jack Webb show yesterday, the police department retrieved the sweaters before they were known by the owner to have been stolen, and in this instance, four minutes after a robbery, and perhaps before it had been reported your policeman had picked up the loot. Now, should every bent license plate - should your policeman feel free to stop any one of them - my car or anybody else's and say, "All right, step outside. I am going to search the automobile". Is that a legitimate . . .

CHIEF PARKER: No, we don't do that, and if we tried to do that we wouldn't get anything done at all. You see, that is where they don't give any credit to any intelligence on the part of the police at all. We have recovered many stolen automobiles before the owner knew they were gone because of the erratic manner in which they were driven, and a prudent inquiry on the part of the police officer as to whether or not the operator was lawfully in

possession of the vehicle has resulted in the recovery and the owner notified that his vehicle had been stolen before he knew it was gone. But that is our whole point of contention. The courts give no credit to any intelligent exercise of discretion on the part of the police officer. An experienced police officer many times will sense things, and when they appear in cold print before the Supreme Court they are completely lacking in any probable cause, but to that officer at the time of the circumstances, in connection with his experience, his judgment, his evaluation, there was reasonable cause to make inquiry, and then when, as a result of that inquiry, he finds that he was right and the suspect had narcotics on him, you can imagine the devastating effect upon his morale when he is told by the Supreme Court that he doesn't know his business.

BRADY: Thank you very much.

CHAIRMAN SMITH: Mr. O'Connell?

O'CONNELL: Chief, have you had an opportunity to consider the proposals which were made this morning by District Attorney Roll?

CHIEF PARKER: Not fully because that whole situation is an area of study at the present time. On his original proposal, we had many quarrels, and then the Attorney General appointed these two committees, one in southern California and one in northern California, I believe. I am sure the City Attorney of Los Angeles is a member of that committee. We haven't done too much because we don't know exactly what the committee is going to come out with. I am not too sold on this idea of arrest. I am not quite clear on the ability of an officer to hold a man without arrest,

because my understanding of an arrest is that the moment you stop and detain an individual and prevent him from going about his way freely, you have arrested him.

O'CONNELL: As I understand it, perhaps under present law any detention would be an arrest, but under the proposal there would be a detention possible which would not constitute an arrest.

CHIEF PARKER: Well, that is what they propose, and I haven't quite figured that out yet. Just how can you arrest a man but not arrest him?

O'CONNELL: You haven't had the opportunity, then, to consider these proposals.

CHIEF PARKER: Well, I have considered them - I want to look at them. I am the Vice Chairman of the Law and Legislative Committee of the District Attorney's Association, the County Peace Officers and Sheriffs Association. That is the committee which makes recommendations to you at every session as to what they believe about certain proposed legislation that affects the field of law enforcement, so I haven't the time to study the proposals, and I am waiting until the committee comes up with its ultimate proposal and then, through the processes, we will meet together, probably in Alameda County, as a committee representing all three agencies, and at that time we will have considered things to say about it and probably that is where you will get the unanimity of opinion as to whether these laws are good or bad. I might say this. Regardless of whether you come from a so-called cow county or a smog county, I can't find this difference of opinion in the field of law enforcement. In working with that committee for several years, I find an unusual ability for these groups from

all parts of the State to come together in common decision. I can tell you right now that you can go to any police force in the State of California, and they will tell you about the same thing I have, maybe in different words, about what they think of the exclusionary rule.

O'CONNELL: What I am trying to get at is whether it is possible to maintain the exclusionary rule and make some changes in the law of arrest and of searches and seizure, search warrants, and so forth, and, by doing so provide effective tools for law enforcement officers.

CHIEF PARKER: Well, of course, I have a lot of respect for the judgment of Professor Barrett, and he went into detail on that, I believe. I have read his material. I don't necessarily agree with all of his conclusions, but I think he has done a terrific job. Obviously, anything the Legislature can do, for example, in the field of search and seizure and in the field of the law of arrest to somewhat broaden the authority of the officer so that the arrest, which today the court might say was illegal, under whatever you might do as a legislator, say is a legal arrest; then, of course, the right to search under their prevailing decision - the incidence in which the right to search would be upheld would be increased. I am not going to say that that is going to do the job. The only prophecy I made was when the exclusionary rule was applied. I said it set back law enforcement fifty years with a resultant rise in crime. At that time they said I was wrong, but I would like to call your attention to the chart again. Those things will all help. For example, this has got me puzzled. The Supreme Court has come down with this two-day deal on detention

before arraignment or taking a man before a magistrate, and I have always understood that that section applied only to arrests made pursuant to a warrant, and they have me totally confused now. That is the way I was taught the law, and that is the section that is in the warrant section, but now the Supreme Court has just ignored the distinction in their last two decisions, that the two-day rule only applied to arrest pursuant to a warrant and that arrests made without a warrant, that unreasonable delay was the determining factor as to whether the detention was illegal beyond a certain point. So, once again, maybe the Legislature had better clarify that one. There is a lot that you can do within whatever the court says that your constitutional area is.

O'CONNELL: That is included in the District Attorney's proposals.

CHIEF PARKER: It is a tough one. You have a very difficult job ahead of you in attempting to anticipate what these new laws will do when they are actually applied into the field, and it is almost a crystal ball operation. I can assure you that I will personally give full study to whatever the committee recommends, and, strange as it may seem, the City Attorney of Los Angeles and I seem to agree on practically every point as we go along, and working with him as a member of the committee, I am sure that what they bring before you in the ultimate, we will back and it will be a help - anything that you may do along the lines suggested. I further urge in my recommendation as one thing you can do now is what Michigan did, and I think you heard Professor Barrett tell you yesterday that he believed that you can do that constitutionally because of the language of the court in referring to it as a judicially created

rule of evidence which Congress might negate, and after all you are the congress of the State of California.

CHAIRMAN SMITH: Mr. McGee.

McGEE: Chief Parker, these statistics upon which your chart is based are predicated on crimes committed. It has nothing to do with arrests, has it?

CHIEF PARKER: On crimes reported. It has nothing to do with arrests. These are actual offenses reported to us by the victims.

McGEE: And it was sufficient on investigation to warrant it being called a crime, whether or not there was an arrest or a conviction or anything else.

CHIEF PARKER: This is the ultimate result of criminal activities.

McGEE: Your point is that the Cahan case has diminished crime prevention rather than its effect upon crime prosecution and conviction.

CHIEF PARKER: That is correct, sir.

McGEE: Would you say that that trend which is obtained in the city, from your knowledge, although you may not have the statistics, would also obtain in the entire county?

CHIEF PARKER: It would probably be some months before we find that out. Just like the Attorney General's report. That report has only been out a couple of weeks and he is dealing with the first half of last year. It just came out, so we have no way of knowing what their pictures will be until they emerge from their statistics. Now, our press in Los Angeles insists on the years statistics at the end of the year, so . . .

McGEE: On a calendar year basis?

CHIEF PARKER: That is right, so we have been geared up to

in that way, and that is why we can come up this soon with the actual crime history for the year. Maybe some of the other agencies aren't equipped with the tabulating equipment that we have and can't work that rapidly.

McGEE: Do your statisticians have figures on arrests as against frauds over a comparable period demonstrating that perhaps the Cahan rule has not diminished the number of arrests but has increased radically the number of where you throw them out without proceeding?

CHIEF PARKER: We can get that information, yes. How much difficulty is involved, I am not sure, because we have been depending somewhat on the District Attorney's statistics. He keeps an accurate record of the complaints which are applied for. Many people are released by the police after arrest because there is insufficient reason to proceed with the complaint. We could get that information, although the study has not been made to date. We have had very little time, as you can appreciate, to get together this much material.

McGEE: Well, finally, in your recommendation that we immediately adopt the Michigan procedure, would you, as in Michigan, limit it to narcotics and deadly weapons - dangerous weapons?

CHIEF PARKER: That is my proposal, that you separate these recommendations into two categories: one, the recommendation changing the laws of arrest and search and seizure, which you all realize is going to take very, very careful study. But you do have a case history here with another state, which is not too unlike the State of California with its large industrial areas, which has had experience with the exclusionary rule, lots greater

experience than we have had over a long period of time, and the people of that state saw fit to make some changes. I believe that when the Commissioner from Washington testified he failed to tell you what the result of the Michigan change was in the field of narcotics in the Detroit area, the marked change and the decrease in the problem, as a result of this amendment to Section 10. So, it is my premise that you can fall back upon the history of this exclusionary rule in the State of Michigan, and that that gives you ample experience to apply the same situation in California without any great detailed study that they applied in Michigan.

McGEE: But limiting it to the two subjects?

CHIEF PARKER: I would suggest a rule of law reading almost identical. That is all that I am urging at this time because I know this is a moot question. I appreciate that, and if I seem a little vehement, I just do that because I am trying to make up for the lack of other voices there may be on my side.

McGEE: Thank you. That is all, Mr. Chairman.

CHAIRMAN SMITH: Thank you very much, Chief Parker. I appreciate your information, and while you are here, we want to express our appreciation for your letting us have this auditorium. This has been a fine place, and we appreciate the help you have given us.

CHIEF PARKER: We are very happy to have you here, Assemblyman Smith, as you know. We want everybody to see this building. We are very proud of it.

CHAIRMAN SMITH: Now, I have several announcements, and then we are going to lunch. The movie "The Big Push" which we saw yesterday will be shown again at lunch time if any of you want to

stay and see it.

Mr. B. T. Mitchell, Deputy Commissioner of the Federal Narcotics Bureau, probably will be the first witness after lunch when we convene at 2:00 o'clock. Let me check some of these other witnesses. Mr. Mitchell, about how much time would you like?

MITCHELL: I don't think over fifteen minutes.

SMITH: All right, and Chief Eggers?

EGGERS: Fifteen or twenty minutes.

CHAIRMAN SMITH: And Chief Allen?

ALLEN: About the same, I think.

CHAIRMAN SMITH: Is there anyone else in the audience who feels they want to be heard before we adjourn? We will adjourn until 2:00 then.

2:15 p.m.

CHAIRMAN SMITH: The meeting will come to order. Our first witness this afternoon will be Edward J. Allen, Chief of Police, Santa Ana.

ALLEN: Well, Mr. Chairman and gentlemen, perhaps I should preface my brief statement by saying that thus far I have spent the major portion of my law enforcement career in the states of Pennsylvania and Ohio, having been in Santa Ana less than a year, and I can testify to the fact that in those states the exclusionary rule does not apply, and I have appended to my statement a brief memorandum from the Hon. C. William O'Neill, Attorney General of the State of Ohio, which states that "in a criminal case evidence obtained by an unlawful search is not thereby rendered inadmissible, and, if otherwise competent and pertinent to the main issue, will be received against an accused". The court, in State v. Lindway,

supra, further stated that in cases of illegal search the proper remedy, of course, is a civil action in trespass against the officer.

Now as search and seizure specifically relates to narcotics traffic, in the sections of the Ohio Revised Code, for the purpose of the enforcement of these sections, anyone empowered to enforce, as provided in Sections 3719.18, may enter and search any room, rooms or other place wherein a violation of the narcotic sections occur or is believed to exist. In other words. they are permitted, on information and belief, to search these rooms and premises. No one shall hinder, obstruct, or interfere with the enforcement of such sections. Since and until the so-called Cahan decision, pertinent evidence illegally obtained was admitted in California courts. A sudden reversal of this traditional custom takes law enforcement by surprise and, in effect, redounds to the benefit of the law violated rather than the law-abiding citizenry. To better serve the interests of the public, therefore, I would advocate the exclusionary rule be waived insofar as it applies to narcotic cases and all other serious crimes, and, as you are doing, it would prove beneficial to re-examine the wording of the Penal Code with respect to search and seizure.

It is my belief that a search warrant ought to issue upon reasonable information and belief. The section ought to be clarified so that it would permit the issuance of search warrants at any hour of day or night, and the use thereof. There are many instances when the time element is important and immediate action is essential, and law enforcement ought not be precluded by highly technical interpretations in enforcing the law and thus protecting the lives

and properties of the people. Inasmuch as the courts approve of the physical arrest and search of persons without warrant for reasonable cause, the same approval ought to obtain in the search of property where reason convinces the officer that the probability of finding illegal contraband exists. It ought to be conceded by the courts that police officials are responsible officers and citizens, and the word "reasonable" ought to be as liberally interpreted in their favor as it is in the favor of those who violate the law. In this respect I am in accord with the statement of Director John Edgar Hoover of the F.B.I. who said, and his statement has nothing to do with the particular case in point because it was uttered in a public address over a decade ago:

"Criminals are being turned loose in the name of civil liberty, not because there is any question of their guilt, but because certain public officials of our land are prone to guard more zealously the alleged civil rights of confessed criminals at the expense and the detriment of disregarded civil rights of the victims of their crimes. The same standard should govern the rights of the victims of crimes as are so rigidly applied to the rights of the criminal transgressor".

Now, it has been my experience, here and elsewhere, that no matter how efficient a police department may be and no matter how careful to observe civil liberties of long standing, it will always have to fight its way against an undercurrent of opposition and criticism from some of the very elements which it is paid and served to protect and to which it is, in the final analysis, responsible. This is the enduring problem of a police department in a democracy.

There is one aspect, gentlemen, that I failed to include in my written statement which I think it is most important to point out from a standpoint of law enforcement itself, and that is that

this so-called Cahan decision opens up a perfect avenue, or a perfectly plausible alibi, to the crooked cop. The chief can assign men to the vice squad or any other particular phase of law enforcement that calls upon the searching of premises or persons to secure evidence. These men can go out with sledge hammers and other illegal implements, literally tear a place apart, and then come back and report to the chief that they understand now that they have obtained this evidence illegally and therefore it is inadmissible in court.

With respect to the narcotics law, there is a very apropos piece in the Los Angeles TIMES this morning which states that a huge rise in drug addiction is predicted for Los Angeles in the coming year. Almost half again as many Los Angeles children and adults will become dope addicts in 1956 as were addicts last year, and I submit that the courts of our land ought to be bending over backwards to assist law enforcement to stem this terrible tide of dope addiction rather than make it easier for those who, on the outside of the law, are peddling this stuff and thereby undermining the present and future generations of our country. Up until Spring, I understand, late April, the law had been firmly established in California, as it has been established in Pennsylvania and Ohio and a majority of all the other states in the Union, including the British Commonwealth, and after perusing the dissenting opinion in this case, Judge Spence says that this adherence to the admittance of evidence illegally obtained is in line with the views of the most eminent legal scholars, and I find myself fully in accord with that statement.

Thank you, very much, gentlemen, for this opportunity.

CHAIRMAN SMITH: Are there any questions of Chief Allen?

Thank you very much, Chief. We appreciate your coming.

Now, Mr. Mitchell, let's hear from you. This is Mr. B. T. Mitchell, Assistant Commissioner of the Federal Bureau of Narcotics.

MITCHELL: Mr. Chairman and gentlemen of the committee, it is a privilege to appear here today. I want to begin by saying that any remarks I make with reference to the Cahan decision, the so-called exclusionary rule, pertain only to narcotic enforcement. Perhaps it might be appropriate to set out in the beginning what we in the Federal Bureau of Narcotics consider to be the responsibility of the states and city government.

We have only 250 narcotic agents to cover the whole United States, and some of these men we have overseas. Obviously, we can't police the whole field. We devote our efforts to the international and interstate traffic and feel that it is the responsibility of the state and city officers to take care of their local traffic. We have found that we can only obtain effective narcotic enforcement by complete cooperation between all officials. Therefore, and this is my interest in the matter under consideration here, anything which hampers local enforcement, hampers federal enforcement and vice versa, as far as that goes.

Now, I would like to point out a peculiarity of the narcotic traffic which I think justifies the taking of rather drastic action to control the traffic. The peculiarity is this. In most offenses you have a complainant. To be specific, if someone steals your automobile, you immediately go to the police and you will render the police all the assistance you can. If somebody sticks you up, you will do the same. Now the narcotic traffic is a very secretive

criminal operation. The peddler is satisfied when he makes the sale and receives his money. The addict is satisfied when he gets his narcotics. You have no complainant. You have to penetrate the underworld and operate on information.

I might say to you gentlemen that in our opinion you have a very serious narcotic situation in the State of California. California is in somewhat of a unique position as pertains to the narcotic traffic in that you have three sources of supply, particularly for heroin. There are floods of heroin coming into California from Communist China through Hong Kong. You get considerable quantities of heroin which comes from Turkey, Lebanon, through Italy and France into New York City and thence into California, and your third source is Mexico. Most states are not in that position, but you have three sources here.

Now we in the Federal Government have to work under the so-called exclusionary rule. As a matter of fact, the Supreme Court in the last fifteen to twenty years has so drastically restricted federal officers with reference to arrests and searches and seizures that we have had to completely change our modus operandi. We work now - and it costs us much more money and takes a great deal more time - what we call undercover. We work our agents into the mobs and buy the narcotics. Then we are sure we have a case. We can't always be sure on a search and seizure.

Something has been said here about this constitutional amendment in Michigan, and if I may, I would like to make an observation, according to my information, of what resulted there. I want to, by the way, couple it with one other action in Michigan, a rather pet subject of mine, and that is drastic mandatory penalties for

narcotic trafficking. About the same time the constitutional amendment went in in Michigan, they passed some rather drastic penalties. At that time Detroit was the source of supply for the State of Michigan and the State of Ohio. Immediately after the passage of the constitutional amendment and the drastic penalties, the traffickers and the addicts moved to the State of Ohio, which, by the way - and that is another reason I want to couple these two - does not have the exclusionary rule but had some very light penalties. The situation got so bad in Ohio that the last legislature enacted some very drastic penalties; as a matter of fact, a minimum of twenty years for sale of narcotics. The word in the underworld in the State of Ohio now is, "Get out. We can't stand this kind of treatment. We will move to some state where they are more lenient". As I said, I would like to couple the two. I would like to see some more drastic penalties in California.

Now, I would like, gentlemen, if I may, to cite two actual cases to show you the effect of the exclusionary rule or what can be done where you do not have the exclusionary rule. I might state here, by the way, that in a great many instances we take cases to state court, and our efforts in the State of California have been considerably hampered by the Cahan decision. I want to call your attention to a case in San Francisco about two years ago. Our District Supervisor received a telephone call one afternoon. The man at the other end of the line said, "Don't ask me my name. I am not going to tell you. I want to give you some information. This morning there was brought off the President Cleveland two camphor chests which have come out of Hong Kong. They are loaded with heroin, and they are in a room at such and such an address".

Obviously, you couldn't get a federal search warrant on that. Our agents got the San Francisco police and went up to the room. Two Chinese were there, as were the two chests, and those chests contained between 25 and 30 ounces of pure heroin. Those two men are now doing long terms in your state penitentiary. I just want to say, what would that situation be today? Frankly, I don't know what we would do. I don't know what an officer would do under those circumstances. He wouldn't have a case, but at the same time, can you ignore information on 25 or 30 ounces of pure heroin worth thousands and thousands of dollars in the illicit traffic? On the other hand, if he goes to the room and makes an arrest, he may face a suit for unlawful arrest. I don't know what the situation would be today, as I say.

Now, I want to cite another case - a very recent case of ours - in New York City. The State of New York does not have the exclusionary rule. About three months ago an informer told one of our agents that a certain person was in the narcotic traffic in a big way. We knew very, very little about this person. We had heard of him and that is all. We spent six weeks of 24-hour surveillance on him. The informer absolutely refused - he could have introduced an agent undercover, but he refused to do it. He said, "This is all I will do. I will tell you what he is doing". As I said, we spent six weeks of 24-hour surveillance on him. Another man came into the picture, and we concluded that at a certain apartment they had what we call the "plant", the narcotics. That was still not enough. We couldn't have gotten a search warrant. I don't know whether we could have have gotten it on surveillance or not. They just went to this apartment so many times, and then

because of various actions of theirs after that, we concluded that was it. We got the police and went into the apartment while they were there and made one of the biggest seizures of heroin that has been made in the United States in many years, thirteen and a half kilograms of pure heroin. Had that same situation prevailed in California, I don't know what we would have done with it.

Now, as I say, we have to depend on the states because we work under the exclusionary rule. I wish we didn't. I want to endorse what Chief Parker said this morning regarding something to the effect that experienced officers sometimes get a sixth sense and can spot a criminal. That has certainly been my experience and in my observation in some twenty years in narcotic enforcement. As I say, I will tell you a little amusing incident that pertains to myself. One afternoon I had a memorandum come across my desk that two experienced agents had stopped a fellow whom they knew - he had a narcotic record - and thought from his actions he probably had some narcotics on him, so they stopped him and searched him. He didn't have any narcotics. When I saw that memorandum, I called our supervisor and told him to call those two boys in and discipline them very strictly for that kind of action. The next morning early I got a call from my supervisor. He said "Do you still want me to discipline these two boys?" I said, "Yes, haven't you done it?" He said, "No. They were out yesterday afternoon when you called me. The reason I asked you if you still want me to do it is that last night as they were driving through the city they saw a man in a taxicab who looked suspicious to them." (That sixth sense working). "They followed the cab, it drove to a bar and parked in front. A man came out of the bar with a zippered canvas bag. He

entered the taxicab. At the time the agents got out of their car and asked those men to get out of the car, asked them what they had, searched the bag, and it was 100 ounces of heroin". Now, the supervisor asked me, "Do you still want them disciplined?" I said, "Yes". I just wanted to endorse what Chief Parker said about that sixth sense with an experienced officer. It will happen.

I hope, gentlemen, that some action can be taken in the State of California to relax this exclusionary rule because it is, in my opinion, having a bad effect on narcotic enforcement.

Gentlemen, that is about the extent of my remarks. If you have any questions, I will be very happy to answer them.

CHAIRMAN SMITH: Any questions? Mr. McGee.

McGEE: We had some testimony yesterday that heretofore the federal authorities were prone to prefer to have prosecutions in the narcotic field for possession and so forth processed in the state courts because of the exclusionary rule in the federal courts.

MITCHELL: We do that in a great many places, yes, sir.

McGEE: That, of course, is now out the window as far as California is concerned.

MITCHELL: As far as California is concerned, it is, yes.

McGEE: What will you do now?

MITCHELL: As I pointed out a little earlier, we have had to, in working on the interstate traffic and international traffic, change our modus operandi, work our agents undercover into these mobs, and that take months and months and months and costs a lot of money. It takes a long time for a man to get the confidence of these mobs and actually buy the evidence from them. We will have to resort to that and are doing it right now in California. That is

the only way we can make a case that will stand up in federal or in state court.

CHAIRMAN SMITH: In this New York case you mentioned, Mr. Mitchell, under the federal exclusionary rule, did you have to prosecute that case in a state court?

MITCHELL: That went into state court.

CHAIRMAN SMITH: Now, you mentioned that you thought we ought to have more drastic penalties in California. This, as you probably well know, is a subject dear to my heart, and would you tell me which sections - where and why - what advice you could give me on where we ought to increase the penalty?

MITCHELL: I can't cite you the section, sir. I would make this recommendation. It is a recommendation we have made to the Congress. The present federal law is for a first offense, not less than two or more than five years for sale or possession. For a second offense, not less than five or more than ten years, and for a third and subsequent offense, ten to twenty years. We have found that that still has not quite had the desired effect, and we have made the recommendation that, with reference to the first offense - here is what is happening in the traffic. When that went in, a lot of these old-timers that have been in once or twice said they couldn't take it. They are nearly fifty or sixty years old, and they say that will mean a life sentence if they get ten years, so they are putting these young fellows out front to do the negotiating and make the deliveries. We have recommended in the Congress that for the first offense, as to sale, there be a minimum of five years. Leave the rest of it as it is. And that, sir, would be my recommendation to you.

CHAIRMAN SMITH: Now, when you mention your recommendation to Congress, a minimum of five years on the first offense, are you still going to leave the probation clear across the board as it now is in federal?

MITCHELL: No, sir. In federal it is only probation for a first offense. For second, third and subsequent, there is no probation in federal. Only for a first offense, and I would say no probation on the sale for the first offense. That is what our recommendation has been. Five years with no probation for sale for first offense. I don't object to probation for possession because nine times out of ten your possession case is an addict, and while sometimes you are not too successful, there is always some hope of curing them.

CHAIRMAN SMITH: Do you think it is possible to break it down, or do you think it should be broken down as to difference of sale? What I am particularly driving at is this problem that we face in California, which I have argued with Mr. Gentry of your office off and on on a number of occasions, where we may have a teenage boy, never has been arrested, a fine fellow. He is down in Tia Juana and picks up two or three marijuana cigarettes. Sunday night they are at some club where the boys meet and he says, "Here is a marijuana cigarette I got down in Mexico. Why don't you smoke it?" Well, now, you know as well as I do that giving it to him is the same as a sale. That's a violation. The same penalty would apply. Now, should we have no probation in that one instance on that individual and send him to the penitentiary for five years?

MITCHELL: I would that, Mr. Smith, in this manner. You are probably familiar with the so-called Brooklyn procedure on these

juveniles? I have forgotten the name of the U. S. Attorney that put that in there. You file the charges against him, and it amounts to unofficial probation, and if the boy behaves, never prosecute him. I would take care of a situation like that in that manner.

CHAIRMAN SMITH: Well, let's make the boy just 21 years old. He has never been arrested; he comes from a good school, a good family, and is a real fine fellow. He has never been in trouble. As soon as he goes in, they are going to give him five years. Then everybody floods the District Attorney with letters, phone calls, and so forth, saying "You can't send that boy to the penitentiary for five years".

MITCHELL: Mr. Chairman, I would say this, in my experience in the narcotic traffic, narcotics are of the underworld, and I have yet to see a nice youngster who could get narcotics. They won't trust him. I will give you an example. I had a young fellow what was about 22 years old, a young newspaper reporter. He look like he was about 17. He came into my office and told me he knew they were selling narcotics at such and such a street address in Washington. I told him I knew there was some traffic up there, but he insisted that anybody could buy it, even the kids. I gave him some money and told him to go up there and buy some, and if he didn't want to testify, he would never have to. I didn't hear from that fellow for sixty days. Finally he came in looking rather sheepish. He had a piece of what he thought was a marijuana cigarette but wasn't, and he had gotten pretty badly beaten up. He didn't belong there. He didn't know those people, those traffickers, and you are not going to get it unless you do.

CHAIRMAN SMITH: Do you think it would be constitutional to

attempt to break down the penalty between first offenses under 21 years of age or over 21?

MITCHELL: With regards as to whether it could be constitutional, sir, I don't know. I don't know enough about California law. I rather doubt that it would, federally.

CHAIRMAN SMITH: This committee has, as you know, since 1951 made some very drastic changes in the narcotic statutes going from two to six, clear on up. Our penalty now for either possession or sale is five to life on the first offense, with only the probation on the first, and it is ten to life, mandatory, on the second, even for possession, as you well know, which, I think, are probably higher than most other states if it is ten to life on the second. What I am getting at is the problem we always face in trying to make them apply to this one individual, the first offender, who never has been in trouble, and still get the peddler. Now, the real bad pusher, there are fewer of those than the others because they are smarter and they are harder to get. We would be glad to salt those fellows away forever, but we are still faced with that one problem, and I am wondering how . . .

MITCHELL: That is a problem that I have debated - as a matter of fact, when we got the so-called Boggs Act, our present penalty bill, through, we had that same debate, and as I say again, it is a very rare occasion that the youngster that can get narcotics hasn't already been in some trouble of some kind, even though he might not have been prosecuted. I don't mean that he had been processed through the court, but some juvenile delinquency around somewhere.

CHAIRMAN SMITH: Well, at our close proximity to Tia Juana,

actually we are different than, maybe, Arkansas or Missouri or some of those states. We are faced with a difficult problem. Now, do you have any federal legislation pending at this Congress to increase the penalties of the federal?

MITCHELL: I left Washington last Saturday, and my understanding was that the first of this week the legislation would be introduced. I didn't see anything about it in the papers. I haven't been in touch with my office there, but if it hasn't been, it very definitely will be. As a matter of fact, Congressman Boggs, who sponsored the original bill that went through in 1951, has just finished a series of hearings; he was in San Francisco, by the way, for one or two days, and he definitely told me some three weeks ago that he was going to put in the bill I mentioned here a few minutes ago.

CHAIRMAN SMITH: I recall an article in the paper a couple of days ago where they suggested recommending the death penalty for peddlers in the federal statutes.

MITCHELL: Mr. Chairman, it is a little hard for me to go along with that. That is pretty stiff. I think this, that you would have juries turning a lot of people loose. That is a little hard for me to go along with.

CHAIRMAN SMITH: I assume that if we could catch the individual who turns out a lot of minors in high school and gives them narcotics and gets them on the habit, we probably would recommend certain penalties . . .

MITCHELL: We could agree on that. That's right.

CHAIRMAN SMITH: . . . but the first offender and the other individual, the wife who happened to be in the house when you

catch them on possession and knows nothing of it, or in the automobile, the girl who puts it down her brassiere when the driver says so, and she doesn't know what it is. She is just as guilty if she possesses as anybody else. Don't you think we would have a little tougher time convicting if we had that situation?

MITCHELL: Oh, if you had a drastic penalty. That is the reason I say our recommendation was, as to possession on the first offense, to leave it two to five, and permit probation.

CHAIRMAN SMITH: Anybody else have any questions? Mr. McGee has one other and then Mr. Brady.

CHAIRMAN McGEE: What is the penalty in federal law for the importation of heroin into this country?

MITCHELL: The penalty is the same for importation as it is for sale or possession. That is, two to five, five to ten, and ten to twenty.

McGEE: Isn't there a field there where you might ask for a very severe penalty?

MITCHELL: I have discussed that and have some hopes that we will get some legislation on that. I have discussed it with a couple of senators and several congressmen to put a very severe penalty for smuggling because, after all, there is no heroin manufactured in this country, and heroin is our big problem in narcotics. There is none manufactured in this country. It is all smuggled, and I have some hopes of getting a very severe penalty for smuggling.

CHAIRMAN SMITH: We had a bill up a few years ago and finally decided we would have difficulty passing it. It would have made a distinction between the penalties of heroin, marijuana, and

other drugs. Have the federal authorities ever given any thought to that?

MITCHELL: As a matter of fact, Mr. Smith, I did some legal research on that once myself, and I have had some other people do it, and I reached the conclusion that under the federal law it wouldn't be constitutional.

CHAIRMAN SMITH: We reached the same conclusion; however, as you have mentioned, heroin is the bad one.

MITCHELL: It is our problem.

CHAIRMAN SMITH: Mr. Brady.

BRADY: The question I ask is whether or not your bureau is doing any more towards getting more employees, more enforcement officers? You have about as many men as the Los Angeles Police Department is short of apparently.

MITCHELL: That is just about it. We have about as many as they have in Akron, Ohio. I checked that once. We have asked for them; we have asked for more money. As you gentlemen well know, you are legislators, you have to run the gamut of the budget bureaus and this, that, and the other thing. Frankly, you make me happy when you ask that question. That is another pet subject of mine. I am in charge of enforcement for the entire United States, and the way we have to operate, putting men undercover, we have to have all different types of men. If you are going to try to penetrate a Sicilian mob, you can't do it with a southerner, for instance. You have to have a Sicilian, and I find myself without the proper men to do the job just because I haven't got enough men.

BRADY: So any changes we would make in our own statutes on

arrest and search or anything else would have very little to do with you because you are shorthanded anyway.

MITCHELL: Well, it would do this, sir. As I explained, when you have to operate undercover, it takes months and months, whereas if you can operate on information and go make a seizure, as you could before this decision - for example, like the camphor chest case I cited. If we had had the exclusionary rule then, all in the world we could have done in that case would have been to take a Chinese agent and tried to identify those fellows and let him try to work in and buy, and that might have taken six or eight months, or it might never have happened.

BRADY: Well, with the problem, though, that you have, what steps towards the changing of the exclusionary rule have ever been made by your department or by the F.B.I. to your knowledge?

MITCHELL: The thing is being studied now.

BRADY: Has the study been pursued for very long?

MITCHELL: Not too long, but there are some senators who are interested in it. As a matter of fact, Senator Daniel, who held hearings here, has a committee on it. He is interested in it, and the matter is being studied at this time.

BRADY: I see. On the exclusionary rule.

MITCHELL: To determine what, if anything, we can do by legislation.

CHAIRMAN SMITH: What has been your experience on this Michigan exclusionary rule from the standpoint of whether or not anybody's rights are being violated - that is, the waiver of it?

MITCHELL: I have seen none of that. I might give you a specific example of an operation we had there. There was considerable

traffic in the Chinese section of Detroit among the Chinese. We obtained the services of a Chinese informer who had the confidence of most of the Chinese traffickers, and he would find out when they delivered in stores or on the street. He would find out when a delivery was going to be made, and we would cover it, put them under surveillance, and when the pass was made, we would make the arrest. Well, we cleaned up the traffic in Chinatown in Detroit. There is none there now. Of course, that all had to go in state court. We had to take all those cases into state court.

CHAIRMAN SMITH: Mr. O'Connell.

O'CONNELL: I was looking here at a summary of the law of searches and seizures and the exclusionary rule prepared by the District Attorney's office here in Los Angeles County, and I see reference to one federal case, United States v. Matteis. Are you familiar with that case?

MITCHELL: Frankly, I am not, sir.

O'CONNELL: It says "where an officer has probable cause to believe that a person within a house has committed a felony, he may enter the house to effectuate an arrest even though he may have to break in the doors or windows".

MITCHELL: Is there any citation on that case?

O'CONNELL: 11 Fed. 2d, 503.

MITCHELL: 11 Fed. 2d.

O'CONNELL: A 1926 case.

MITCHELL: That is the reason I asked. That dates back 30 years ago, and, as I mentioned earlier, in the last ten to fifteen years the Supreme Court has more and more tightened on search and seizure. I will venture to say that is not the federal law today.

I would say that later cases in the Supreme Court have overruled that.

O'CONNELL: Well, there is another case here, United States v. Chin On, but that is a 1924 case. I don't think, though, that Mr. Roll would have used the case if it weren't the law today.

MITCHELL: Well, I don't know except I simply say this. I know in the 1940's, particularly since 1940, the Supreme Court has been more and more stringent on us. For instance, let me give you a specific case, sir, that came out of Seattle, Washington, about 1945. It is the Johnson case, and it went to the Supreme Court. Here are the facts in that case. A police officer got a call from an informer who told him there was a woman smoking opium in a certain room in a fourth-rate hotel. Now, this is not even a residence, you understand. This is a hotel. As you gentlemen probably know, burning opium has a very distinctive odor. It penetrates. As this policeman did, he stood in the hall outside that door and smelled the burning opium, and it is the only thing in the world that smells like that. He knocked on the door, and after a minute or two was admitted. The pipe and the lamp were still hot - she had covered them up in that minute or two. She opened the door, he went in and searched the room and found this. Now, that went into the Supreme Court - she was convicted - it went to the Supreme Court, and the Supreme Court recognized that opium has a very distinctive odor and that there was nothing else that smelled like that. They took judicial notice of that fact, but they said the man should have obtained a search warrant. This was at 11:00 or 12:00 at night. Well, I don't know that he could have gotten a warrant before he went in, and that is a hotel as distinguished

from a residence. So I think, honestly, that those cases that you cite there have been, perhaps not expressly overruled, but impliedly overruled.

O'CONNELL: Well, it is possible, of course.

MITCHELL: Because you see the situation in that Johnson case, and that is the Supreme Court speaking, and then you said Federal 2d. Those are circuit courts. Those are lesser courts than the Supreme Court of the United States.

O'CONNELL: This was a narcotics case?

MITCHELL: Yes, and I think that this Johnson case out of Seattle, by implication, overrules that case there.

O'CONNELL: It may have. That is all I have.

CHAIRMAN SMITH: Mr. Mitchell, we appreciate very much your giving your time to come out here. We know it was an effort and we thank you very much, sir.

MITCHELL: Thank you. It has been a pleasure. It is snowing and freezing in Washington, so I get a little sunshine.

CHAIRMAN SMITH: Chief Eggers. Mr. Carl Eggers, Chief of Police of Glendale.

CHIEF EGGERS: I have prepared a statement here that, in the light of what has been said, has already been covered in part, so I want to comment on it as I go along in the light of what has been said this morning.

First, in his letter of invitation, the Chairman of the Committee propounded two specific questions:

(1) Should the exclusionary rule be waived so far as it applies to narcotic offenses?

(2) Is remedial legislation necessary, particularly as it

might relate to requesting the Governor to open the call at the March 1956 session of the Legislature?

In answer to the first question, I believe that it would be a mistake to waive the exclusionary rule in any particular offense. Since the Supreme Court has invoked the rule, I believe that the only practical answer is the enactment of legislation which clearly defines "unreasonable" searches and seizures, and clearly outlines the methods to be used by peace officers in gathering evidence when investigating criminal activity. That I would apply to all, especially felonious activity, as well as narcotics.

In answer to the second question, not only is remedial legislation necessary, the Supreme Court in its discussion of the Cahan case indicated that rules should be established by legislative enactment. It is also imperative that legislative action be taken as soon as possible. However, unless a sound, comprehensive program which has a good chance of passage can be presented in March, it would be better to wait until the long session in 1957. That, again, is my own opinion. You folks on the committee would have a better idea of knowing what could be done in March.

It has been suggested that all that is necessary is the enactment of legislation declaring that any evidence, no matter how obtained, would be admissible in criminal prosecution in this State. Of course, this would effectively negate the exclusionary rule established by the Cahan decision and re-establish the rules and procedures which we followed for many years. On the other hand, I cannot feel that such legislation would be at all in keeping with the spirit and intent of constitutional provisions.

The Constitution guarantees security against unreasonable

search and seizure of the person as well as his property. In the matter of the seizure of the person (arrest) we have, by legislation, established a set of rules (the laws of arrest) which give the peace officer all the necessary freedom of action. At the same time these rules adequately protect the innocent from any type of embarrassment. Legislation should be enacted to establish the same kind of rules covering the search for and seizure of physical evidence.

Along this line, I have several specific suggestions to offer. The first of these has to do with search warrants. You heard District Attorney Roll give quite a comprehensive plan on search warrants this morning. We hear many officers complaining that magistrates are too reluctant to issue search warrants. In many cases these complaints would seem to be justified. However, the sections of the Penal Code dealing with search warrants are worded in such a negative manner that the courts have very little discretion. Some changes in the wording of these sections to give them a more positive meaning would undoubtedly change the attitude of the judges.

An example of what I mean occurs in Section 1525 P.C. which states, "A search warrant cannot be issued but upon probable cause", etc. Most judges interpret this in the strictest sense and for all practical purposes require personal knowledge on the part of the applicant of the exact location of the material which is the subject of the search. If this section was to read, "A search warrant may be issued upon probable cause", or something similar, I am sure the judges would interpret it more liberally and would act accordingly.

Another example is Section 1533 relating to endorsement for night time service. The section states, "The magistrate must insert a direction in the warrant that it be served in the day time unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night".

Many judges interpret this to mean that night time service should not be permitted unless extreme exceptional reasons for it exist. Here again a slight change in the wording would give the judges more discretion and they would properly exercise it. We have found that to be very much against us in obtaining search warrants. In one instance, we had information that narcotics would be at a certain spot within a few hours. We checked and found that the car which was supposed to contain the narcotics was already at the location. We applied for a search warrant. This was at three in the morning, and right after the Cahan decision came down. We got ahold of one of the judges at night and asked for a search warrant to search both the car and the house. He refused it on the information we had. Finally, about ten o'clock the next morning, we got a warrant from him to search the car. Obviously, it was too late to do any good for any practical purposes. With a little different wording here, he probably would have changed his mind upon the necessity or the feasibility of issuing the warrant under the information we had.

Another stumbling block is the reluctance of the judges to issue search warrants unless they at least talk to an informant who has personal knowledge of the location of the evidence in question. In many cases, especially those involving narcotics, the informant is either an underworld informer or an undercover agent. In either

case, it would often be extremely detrimental to the specific investigation or to future investigations to have the informant appear even in the close proximity of the court, much less have his name appear on the affidavit. In fact, an underworld informer would probably refuse to appear, and if he did his personal safety and possibly his life might be jeopardized. This type of situation would be overcome by the addition of another section which would specifically permit a peace officer to request a search warrant on "information and belief" in the same manner as a criminal complaint is filed under the provisions of Section 806 of the Penal Code. The wording you suggested along that same line in your discussion with the District Attorney this morning, Mr. Smith, might cover this wording on reliable information. It might give us the necessary out to cover this particular type of thing.

Some specific provision should also be made permitting peace officers to make searches and seizures without warrants. Very often, especially in narcotic cases, circumstances are such that there is not sufficient time between the receipt and verification of the information and the necessity to move in to obtain a warrant. Legislation following the general provisions of subsections 3, 4 and 5 of Section 836 of the Penal Code, but relating to search for and seizure of physical evidence in felony cases, would certainly seem to be in order. This section 836 refers to the circumstances of personal arrest without a warrant. It would seem that we could invoke some of the same procedures in search and seizure of physical evidence.

Enactment of legislation along these lines would remove the unreasonable restrictions set up by the Cahan decision. It would also provide the necessary set of "ground rules" which have long

been lacking and which law enforcement needs to properly fulfill its mission of protecting society from the ravages of criminals. At the same time, society will be adequately protected against the overzealous peace officer.

It has also been suggested that some changes in the laws of arrest would help to remedy this situation. It is my belief that the laws of arrest in themselves are quite adequate and provide all the tools necessary for the peace officers to do the job. There are one or two procedural changes, however, which to my mind would speed up the work and cut down some of the red tape. One of these would be the extension of the new section in the Penal Code permitting the sheriff's officers to use the citation method in some types of enforcement. It has nothing to do with the type of enforcement we are using now or what we are talking about here. If that were extended to the city police, it would let us cut down some red tape and in many ways increase the manpower by cutting down the amount of time the men have to spend.

Then, aside from the prepared statement, the District Attorney brought up the matter of wire-tapping this morning. It has long been my belief that wire-tapping, under some conditions, would be very beneficial to the furtherance of police investigations. It should be restricted and confined to those situations which, where evidence is needed and cannot be obtained in other ways, should be under the strict jurisdiction of the courts under the same procedure as search warrants, but it would be very helpful in many cases for us to be able to use it. That type of evidence often isn't good in court because of the difficulty of identifying the person talking. It certainly would be very helpful to us

to gain information and go out and get other evidence that could be and would be used in court.

Another point that was brought up by Chief Parker was on the increase of crime, and you asked him some questions about the territory around Los Angeles. In our own case, our records show that during the last year we show a slight decrease of about one and a half per cent in the class one crimes for the entire year, but in the month of December we show an increase of that type of crime reported from 156 in 1954 to 240 in 1955, a little better than fifty per cent. In burglaries alone, 19.6 per cent decrease for the year of 1955 below 1954. In the month of December, our statistics show a 29 per cent increase for that month over the month of the year before. I give you that for your information.

McGEE: Those are crimes, not arrests?

CHIEF EGGERS: Those are crimes reported to us and verified. I give you that for your information to back up the statements made by Chief Parker. I personally feel that this entire problem of the laws of seizure, our rules that we follow, have been completely turned over by the Cahan decision. It becomes a matter for legislative action. I have given a few suggestions; others have given many others. It is a matter for legislative action to come up with some sound rules under the Constitution defining that little word "unreasonable". You talk about the exclusionary rule, but the actual proposition is that no one has ever sat down to say what is reasonable and what is unreasonable in the field of search and seizure and physical evidence.

CHAIRMAN SMITH: Any questions of Chief Eggers? Mr. Brady.

BRADY: Will you recite, please, again the figure on the crime

in Glendale in 1954 and 1955? You had a couple of paragraphs.

CHIEF EGGERS: In 1954, we tabulated 2,049 major crimes, class one crimes as listed by the F.B.I. In 1955 we tabulated 2,017. In the month of December, 1954, we tabulated 156. In the month of December, 1955, we tabulated 240.

BRADY: Why would that month be so outstanding? Have you any idea?

CHIEF EGGERS: I cannot give you any reason for that. There were only three months in the year 1954 where we tabulated more crimes of that type than we tabulated in 1954, January, November, and December, 1955.

BRADY: Thank you, Chief.

CHAIRMAN SMITH: Chief, this one suggestion here is a new one to me. I never have heard this before, to use the citation procedure in certain types of crimes. What are you referring to, 415's and things like that?

CHIEF EGGERS: Let's put it this way. We had the citation procedure established in the Vehicle Code.

CHAIRMAN SMITH: That's right.

CHIEF EGGERS: In the last Legislature, we enacted legislation to put Sections 853.1 through .4 in the Penal Code, which is an enabling act, enabling the counties to use that procedure in the enforcement of some county ordinances if they so desire. The Legislature didn't see fit to extend that to the city police departments. It could very well be used. A suggested extension there would simply be to cover city ordinances, but it could very well be used in such things as 415's and similar minor misdemeanors that take a while to bring somebody in and book them when they could

just as well stay home and come in the next day to see the judge.

CHAIRMAN SMITH: Like burning incinerators at the wrong hours, or dogs running loose without a leash?

CHIEF EGGERS: Those things. Many of those laws aren't now enforced in a lot of the cities because of the time it takes to bring a person in and book them and go through all the procedures.

CHAIRMAN SMITH: Yes, but you don't always book them. You go to the City Attorney who writes them a letter and says so and so is complaining about your throwing rocks at me, swearing at my wife, or something.

CHIEF EGGERS: It takes a lot more time to do that than it does to write a citation on the spot and walk away.

CHAIRMAN SMITH: I think it is very interesting. I was just wondering where you would use it. You couldn't use it in any of these major crimes.

CHIEF EGGERS: No. I want to cut down on the time spent on these minor crimes and in that way you get the manpower for work on the major things.

CHAIRMAN SMITH: I think your bail thing is good, but I assume that the bail bondsmen would be in Sacramento en masse at the last suggestion.

CHIEF EGGERS: That is included in the District Attorney's suggestions.

CHAIRMAN SMITH: That is very interesting.

CHIEF EGGERS: Well, let the jailor turn them loose on a written promise to appear in court, or maybe the supervisor of the department. It is just an extension of the Vehicle Code

provision of citation. You know that is what we do when we give a man a ticket. The man in the field turns him loose on his written promise to appear in court.

CHAIRMAN SMITH: Well, I can see how that would work in Glendale where you know everybody in the city, but in Los Angeles with a million people, they would spend three times as much time chasing them again afterwards. I think they would have an awful time of it. At least they are going to get their fifty bucks. It is interesting indeed. Thanks very much, Chief. We appreciate your coming down.

BRADY: Thank you very much. You make one remark in here that is also very entertaining and most enlightening when you suggest, by inference, that perhaps we could do some things on a county-wide basis, because Chief Parker mentioned something about his extraordinary crime problem and so did Ernie Roll, but perhaps some of these statutes we could make refer to county-wide situations and city-wide situations.

CHIEF EGGERS: Well, it could be done. I think you are confusing something else there but, at the same time, I didn't . . .

BRADY: No, there is an inference in here that would suggest that. I may have carried it too far.

CHIEF EGGERS: Since you brought up the matter of crimes committed, I have copies of that particular piece, and I will see to it that the committee receives copies of it.

CHAIRMAN SMITH: Chief Grayson, have you decided to give us some words of wisdom, or are you still going to listen? Do you have anything you want to tell us about Bakersfield? This is Horace V. Grayson, Chief of Police, Bakersfield, California.

CHIEF GRAYSON: I didn't think that I would be able to offer anything that Chief Parker hadn't covered thoroughly. However, in his talk I noticed there were several things there, one in particular, which I thought I would like to back him up in. He did mention that because of the restrictions that are apparently being placed on the police and not on the criminal element, it is making it possible for the Communist and the Communist front people to instill a fear into the police officers to the point that they won't work, won't take a chance. Now, believe me, that is happening. It is happening to me at the present time in the City of Bakersfield, and has for some time, and where I haven't anything else to add, I think it is well worth while for you to take Chief Parker's statements along that line very, very seriously because we are being chased into a shell by these people on every occasion they get. I don't think that the courts are deliberately doing it, but I think the pressure is being put on the courts through all sorts of front organizations to do everything that the courts can to hamper efficient law enforcement work. Again, I want to state that I don't think any court is deliberately doing it. I think, though, that in many cases the courts are ruling in such a way as to hamper police action very seriously. I think Chief Parker's suggestions on it should be taken very, very seriously. I don't think I can offer anything else, but I did stay over just hopeful that you would let me back Chief Parker up in that one statement.

BRADY: Just a minute, Chief. When the Chief mentioned that this morning, I could see that it is most reasonable, but do you have any specific example or could you tell us anything a little

more specifically in that same vein? Anything you have noticed or anything that you have seen or read?

CHIEF GRAYSON: You mean in my community?

BRADY: Yes.

CHIEF GRAYSON: Why, certainly. Every time we try to clean up juvenile gang activities, or the criminal activities of any particular type of people, we immediately have one of these Communist or racial groups who are pushed by the Communists - now, I want to be clear there that I don't pretend to say that the racial groups deliberately take after the police, but I say that they are being misused by the Communists to make trouble for the police. Every time that we attempt to clean up a bad gang situation, just like you are trying to do here in Los Angeles, the police are immediately charged with one of two things, if not both, police brutality and discrimination. That has happened to me continually in Bakersfield, and this copy of the EXAMINER today is going to be very nice for me to have Monday night because I expect someone to say, "Well, the police are getting too tough" because we are cleaning up a bad situation at the present time, and I know that I shall be attacked and I know I shall be sued. And there again, there isn't any paid insurance for me or for any of my men. I pay my own, and my men have none. Again I say the prosecutors and the courts are free, but I, as a Chief, other chiefs, and our men pay ourselves, and it is possible for something to be done about that.

BRADY: I see. That is very informative. Thank you very much.

CHAIRMAN SMITH: Thanks very much, Chief. Now, there is a lady down here that attends our hearings religiously and would like

to be heard briefly. You will have to give me your name. I have forgotten it.

MRS. RAE SUCHMAN: Mrs. Rae Suchman.

CHAIRMAN SMITH: And your address, please.

MRS. SUCHMAN: 238 North Manhattan Place. First, I want to thank the chairman and the committee for giving me this time as my heart is very much in this issue.

Though it isn't necessary, I want to state that I am a proud member of the Jewish faith so that what I say here will not be construed as speaking for everyone but just for myself. Though I speak only for myself and take personal responsibility, I am a member of the American Legion Auxiliary and many other patriotic groups. I am constantly before the public, and, as an individual, I think I have some of the sentiment of the public that I have heard for the last ten years I have been on the Americanism Committee.

I want to applaud what the last speaker from Bakersfield said. I was very much inspired by the speakers this afternoon. I didn't quite understand Mr. Roll's legal terminology, but to get down to the basic facts, I want to say here and now I think you should very seriously consider what Chief Parker has said. I never was so proud of him in my life as I am now, and of our police department, which is very much understaffed. As the previous speaker stated - they talked about the narcotic division or they would say the gangster's division, the murderer's division, the gambler's division - they are all interlocked. They are all mixed up like a dog's breakfast. You can't touch one without the other. And I want to say that you can't be too strong, friends. These enemies have premeditated

their action. The police department is handicapped. If you do not permit them full play of their duties, you might as well take their guns away and just leave them at the mercy of these gangsters.

There is one thing that has not been emphasized in California. As you know, we are the glamour part of the country. The whole world comes here. We get the good and the bad. I happen to come from Pennsylvania. But we get people from all over. They are attracted here, so you have an additional problem. The police have an additional problem, and I want to say here and now that if the police stopped me on the street, as they did once when one of the lights of our car was out, I thanked them. Whether I have a bent fender or anything else, I want to thank the officers who stop me and put me right. As far as wire-tapping is concerned, though I am a silly old woman, I would not object to even having wire-tapping in my home because I use my typewriter and my telephone all the time on this sort of a mission, and as Mr. Berny Baruch said, no one has anything to fear but guilt, and usually those that have a guilty conscience come up here and object to anything we can do to protect ourselves. This thing is an international problem.

I don't want to be rambling on, but I want to say one thing more before I get off here. All of these people that talk about civil liberties, and these race-emphasizing crews, I have had dealings with them all along. I have been more persecuted by these people, these so-called "pinko-stinkos", than by anyone else.

In going around to all of these meetings, everyone applauds the action that you can't be too tough. As our F.B.I. agents

have said, you cannot be too tough with the enemy who has all of his plans in advance, and I don't think it is fair to put any member of our police department in jeopardy. How would you like to be called out on duty, say goodbye to your wife in the morning to go and meet some kind of a desperate killer with a gun. We don't know what they have to contend with, and I hope, in your decision, that you will think this over.

Now, in talking about the civil liberties, I happen to have been here fighting the red menace for the last ten years. I don't want to bring in any personalities, but I want to say this. I wish the people who talk about civil liberties would give the civil liberties rights to people who are fighting our enemies the same as those who are trying to protect our country. That is all I have to say, Mr. Smith. I don't want to get into personalities, but I hope you will give this very, very serious consideration because, as Chief Parker has said, we are having more grief every day, and if you do not have legislation to be tough with our enemies, you are only encouraging them to give us more grief. I want to thank you very much.

CHAIRMAN SMITH: Thank you very much. Now, let me go down this list. Is there anybody here representing Pat Brown? I want to be sure that I haven't omitted anybody here. Mr. Keller from San Diego County was invited - anybody here in behalf of Bob Keller? Judge David Coleman, Judge LeRoy Dawson, Bill Richards, Mildred Lillie, Judge Walter Odemar? Judge Barker was here this morning, but I couldn't get him on at the time that I scheduled for him. I don't see him in the room. Chief Morris of Pasadena? Chief Hicks from Sacramento? Hal Kennedy? I asked Mr. Bruno Newman

of the Citizen's Advisory Committee, and I haven't seen him yet. Well, I guess that concludes our labors.

Do you have something to add other than what Mr. Wirin said yesterday? Mr. Wirin presented the position yesterday. We will be glad to hear you, but we are getting tired. We have hearings tomorrow and Saturday, but if you have something you think will be of benefit, fine. Come up and start out and let's see how beneficial it is.

This gentleman's name is Mr. Nathan L. Schoichet. He is an attorney at law at 8907 Wilshire Boulevard, Beverly Hills, California. He is a friend of Mr. Wirin's, and he would like to add something to the meeting. Proceed, Mr. Schoichet.

SCHOICHET: Thank you, Mr. Smith. I wanted to say this to the committee. I speak for myself only. I mentioned to the chairman that in my capacity as an attorney I am involved in a law suit involving installation of dictagraphs in the City of Los Angeles, and that matter is now on appeal.

I wanted to make this comment about the inquiry relating to the Cahan decision because I believe it may be pertinent and helpful to the committee. It had seemed to me that there could be very little debate about the principle which underlies the Cahan ruling. The salient rule in that decision, as I read it in this context, is that illegally obtained evidence may not be admitted now, and the thing that the court aimed at, as I see it, is that in those instances where police officers and law enforcement officers had obtained evidence illegally - and no one will pretend that there haven't been such instances - that the aim was to discourage the illegal enforcement of the law, and it would seem to me axiomatic

that a police officer, whose sworn duty it is to enforce the law, must himself not be above the law and that no one could really argue with the principle that police officers must obey the law. Now, I am not suggesting at all that if there is a need to revise the existing legislation in this field, within the framework of the Constitution, that that should not be done. Of course it should be done. If police officers are hampered by the existent law in some way and that law can be amended in such a way that stands under the Constitution, that is a proper procedure certainly. But I, myself, have been appalled that police officers, in some instances, and law enforcement officers generally have argued that the Cahan decision is a bad decision, and there seems to be an implication that if police officers do obtain evidence illegally, well, maybe that is all right. I would think that this committee might come forward with recommendations which might enable the law enforcement officers to work more effectively, but at the same time would stress the importance that under no circumstances should any persons who are in authority over police personnel in any way encourage or condone the violation of law by police officers.

Now, in the history of the so-called exclusionary rule, in California, before the Cahan decision, there were many cases where the courts have used the strongest language and condemned the occasional violations of law by police officers, but nevertheless have admitted the evidence because under the California rule, that evidence was admissible and competent, and Justice Carter, in his dissenting opinions, urged that the only way in which it might be possible to discourage the legal enforcement of law would be to adopt the federal rule.

I wanted to make one other comment on this. There was some reference to the statements by John Edgar Hoover. Of course, the federal arm of government has been working under the exclusionary rule for many years, and I don't suppose it is contended by Hoover or anyone else that they are not equal to their task. I have no experience in the field of law enforcement, and I wouldn't try to debate the requirements and necessities of law enforcement with Chief Parker or any other officer experienced in that field. I am merely urging, and it seems to me so important, that this be recognized, that something must be done about illegal enforcement of the law by police officers, that this is a salutary ruling and has to be appreciated, and that this thought has to be gotten across to enforcement officers everywhere. This goes back to the opinions of Justice Brandeis in the United States Supreme Court in the old Homestead case, that the government act as an example to the people and that the obedience to law by police officers should be required with as much zealousness as that of anyone else.

Now, this, Mr. Chairman, is what I wanted to say. As I said, I have been concerned with this problem because I have worked in it. I have no axe to grind of any kind. I am not speaking for Mr. Wirin, although I know, of course, that my sentiments and his on this subject are probably the same. I haven't heard what he said, and I don't know whether I am repeating what he said or not, but I thought, and think today, that the decision of the Supreme Court in Cahan was a decision which they made after a great deal of searching of their own conscience, that they did so because they apparently, at least as far as the majority was concerned, could

see no other way of getting across to law enforcement officers the fact that they could not be above the law themselves. Sometimes we begin to do the things that we hate, and it seems to me that under no circumstance can the violation of law by a police officer be condoned or encouraged or winked at in any way. This is a real problem, and I am sure that within the knowledge and experience and ingenuity available to the members of the Legislature that it would be possible to make such amendments as may be necessary, within the constitutional requirements, which would nevertheless recognize that scrupulous compliance of law by police officers must be exacted in the same way as we would exact it from everyone else in the community.

CHAIRMAN SMITH: Having worked with this subject and making those comments, do you have any specific suggestions to offer this committee on what specific laws might be changed to assist in the matter?

SCHOICHET: Well, I would say this, Mr. Chairman. I have made some study of the laws of arrest and the laws of search and seizure, although I don't have any practice in the field of criminal law, and I have thought that these laws were adequate. Police officers and enforcement officers who come in and say that these laws are not adequate are much better equipped, probably, to give you specific amendments that they might require. I might suggest this, however. In the work involving the Cahan appeal, as I recall, a brief was filed by the City Attorney's office urging the Supreme Court to grant a rehearing in Cahan, and in that brief - I am speaking from recollection and may be off - I believe it is in that brief that the analysis was presented in behalf of Chief Parker that, in a

period of time which perhaps covered a year, only 17 search warrants had been issued. There is a study by then Chief Judge Richards of our Superior Court which reports the number of arrests and convictions and crimes and cases in the courts - criminal cases - and it occurred to me that the police were just not using the provisions for search warrants, that they were simply ignoring the existence of a search warrant. Now, again, I speak without any deep or extended experience in this field of enforcement, and it may well be that search warrants are impossible to get. I don't know. I dare say that a comparative study with other cities and states might reveal that in other areas of the country search warrants are used much more often than any attempt is made to use them here. I am afraid, and this is purely conclusion on my part, that the police officers in the City of Los Angeles, over a period of the last five or ten years, certainly over the period of the last couple of years, have simply bypassed the provisions of the law relating to search warrants, and it seems to me that perhaps it ought not to be bypassed. There must have been very strong and persuasive reasons for writing these provisions into the code, and it seems to me that where a police department of the size of the one that we have here in Los Angeles, with the incidence of crime they have to deal with, when they can show that over a period of, as I say, I think it was a year or perhaps ten months, that only 17 warrants were issued, that a further study should be made why this is so. Is it that more applications were made which were denied? Is it that they didn't see fit to use this process at all, or there may be some other reason, but I would suggest an inquiry be made in that direction. I don't know what the answer is.

CHAIRMAN SMITH: Well, we have had considerable testimony on that. I take it your answer to my question is that you do not have any specific suggestions of changing any specific laws?

SCHOICHET: No, I do not, Mr. Chairman.

CHAIRMAN SMITH: Mr. O'Connell?

O'CONNELL: Did you hear District Attorney Roll's testimony this morning?

SCHOICHET: No. I didn't get here until this afternoon. I am familiar with District Attorney Roll's position, I believe, because he addressed the Beverly Hills Bar Association at which I was present. I have examined the report which was prepared by his office. I understand that his position is that the Supreme Court ought to clarify the rules that will be applied, and I certainly have no objection to it.

O'CONNELL: He has made some specific recommendations as to changes in the law of arrest and search warrants, and has indicated that, in his opinion, the exclusionary rule could well be maintained if the suggestions were followed, and my purpose in asking the question was what you thought of his suggestions.

SCHOICHET: I haven't seen them. I will say this, Mr. O'Connell. At a time that we were in the first steps in this case involving the dictagraph installation, it became necessary to study the law of New York because it had some pertinence. Now, in New York they had amended their constitution on search and seizure to provide that before you can do a wiretap thing you had to get a court order on an affidavit, almost in the nature of a search warrant, and it would seem to me that some such procedure would certainly be preferable than to permit the decision on the installation of

dictagraphs, for example, to rest in the sole discretion of the enforcement officer, whether it is the chief of police of the city or the district attorney, because our decisions have said, and this can be found in many of the cases, that it would be appropriate to have a magistrate step in between the officer and the man whom the officer seeks to apprehend, and I, myself, would feel that any suggestion which would look towards an amendment of the laws of arrest and search and seizure, which would be in conformance with our constitutional provisions on that subject, that I would go along with them if they were in conformance because I recognize the great responsibility on these officers, that they have this fight to fight, but I urge you on this committee, and I urge upon law enforcement officers who give any thought to this problem, that everything they do in this field must be on the premise that under no circumstance should it be permissible for law enforcement officers to violate the law which they are sworn to uphold and enforce. There should be no question about that at all. There are many, many decisions by many courts which point out that in this fight against crime many officers consider themselves in a war, and they go from that premise to the conclusion that in a war everything is fair. Well, it is not, and it should not be that kind of a war. Gangsters may violate the law, criminals may violate the law, but police officers have to find some way, and we must help to try and find the way for them, of enforcing the law within the law and not bypassing the law in any way. It seems to me, Mr. Chairman, that this thought has to be expressed. Now perhaps it has been.

CHAIRMAN SMITH: Many times. We are all in agreement that law

enforcement should abide by the law and everybody has so testified for two days. I am sorry that you haven't had a chance to hear the testimony, because many of your comments are those that everybody has unanimously agreed upon. The only question is whether or not this is making it impossible for them to catch certain criminals and whether any legislation is needed. There is no question about all of us agreeing that law enforcement officers should abide within the law. They all wish to do it, and we don't have any argument about that.

SCHOICHET: If that is the case, there is no basis for saying that the Cahan decision has been catastrophic on law enforcement. It has been nothing of the sort. It has been the most salutary thing that has happened to law enforcement because it will force police officers who, at one time or another, have violated the law and disregarded it - and this is stated by the courts, not by me, in the decisions - it will put them on their mettle. They are going to have to find ways of enforcing the law and of getting evidence legally because all the Cahan decision does is rule out illegally obtained evidence. It doesn't rule out legally obtained evidence.

CHAIRMAN SMITH: That is correct. We understand that. Thank you very much. Now, is there anybody else out there who wants to talk for awhile? Chief, this is your auditorium, and we will break the rule and give it to you. We are not going to start in and hear every witness over again, I can assure you of that, but we will extend you the courtesy, Chief.

CHIEF PARKER: I would like to state for the record that it is my opinion the witness who just left the stand is testifying

for the Civil Liberties Union. I would also like to state that his client, Al Wirin, stipulated in the case of Wirin v. Parker that the members of the Los Angeles Police Department religiously adhered to the law as they understood the law to be. That is all I have to say.

CHAIRMAN SMITH: Well, thank you all for your patience, ladies and gentlemen. We will see you in March in Sacramento. The meeting is adjourned.

Adjournment 3:45 p.m.

State of California
OFFICE OF LEGISLATIVE COUNSEL

EXHIBIT I

Sacramento, California
May 19, 1955

Honorable H. Allen Smith
Assembly Chamber

Brief of People v. Cahan,
44 A.C. 461 - #11342

Dear Mr. Smith:

Defendant was charged with conspiring to engage in horse-race bookmaking and related offenses in violation of Section 337a of the Penal Code and was convicted. He was granted probation and appealed from the order granting probation and the order denying his motion for a new trial. The Supreme Court reversed these orders by a 4 to 3 decision.

Most of the incriminatory evidence introduced at the trial was obtained by police officers in violation of the prohibitions against unreasonable search and seizure in the United States Constitution (Fourth and Fourteenth Amendments) and the California Constitution (Art. I, Sec. 19) and state and federal statutes (Secs. 146 and 602, Pen. C.; 18 U.S.C.A. Secs. 241, 242; 42 U.S.C.A. Sec. 1983). Some of this evidence was obtained by installing microphones in certain houses, after breaking and entering, and recording conversations carried on in these houses in nearby garages to which wires from the microphones led. The court also stated that in addition "there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants." Overruling prior decisions to the contrary, e.g., People v. Le Doux, 155 Cal. 535 and People v. Moya, 188 Cal. 237, the court held that illegally obtained evidence is inadmissible and it was on that ground that the trial court and orders were reversed.

The court noted that neither the Fourth nor Fifth Amendment bars the admission of illegally obtained evidence, and that the federal exclusionary rule is a judicially created rule. Likewise it has been held that the Fourteenth Amendment, in which the prohibition against unreasonable searches and seizures is incorporated, does not of itself require the exclusion of evidence so obtained (Wolf v. Colorado, 338 U.S. 25). However, the court quoted from the majority opinion of the United States Supreme Court in Irvine v. California, 347 U.S. 128, as follows:

"'Now that the Wolf doctrine [the guarantee of the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth] is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the [exclusionary] rule would be an unwarranted use of federal power.' (347 U.S. at p. 134.) Thus, after states that rely on methods other than the exclusionary rule to deter unreasonable searches and seizures have had an opportunity to reconsider their rules in the light of the Wolf doctrine, the way is left open for the United States Supreme Court to conclude that if these other methods are not 'consistently enforced' and are therefore not 'equally effective' (see Wolf v. Colorado, supra, 338 U.S. 25, 31), the 'minimal standards' of due process have not been met."

The court stated that pursuant to this suggestion it had reconsidered the rule heretofore followed that the unconstitutional methods by which evidence is obtained do not affect its admissibility and had carefully weighed the arguments for and against the exclusionary rule. Setting forth the arguments against the exclusionary rule, the court stated it nevertheless reached its conclusion favoring the rule "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."

"If those [constitutional guarantees against unreasonable searches and seizures] were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented." But, the court noted, reported cases involving civil actions against police officers are rare, and those involving criminal prosecutions against officers are nonexistent.

The court refused to draw a distinction between the state acting as prosecutor and the state acting as judge, saying that "Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants . . . a fortiori, they should not extend that aid and thereby permit the consummation of illegal schemes by the state itself" and adding that "it is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law."

The court noted the argument that in some cases officers have no choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention, said court, is not properly directed at the exclusionary rule, but at the constitutional provisions themselves.

The court concluded with a statement that it was not, in effect, adopting all details of the federal rule and that the details of the rule it had just announced were yet to be worked out. The court stated:

"We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure. The validity of this contention need not be considered now. Even if it is assumed that it is meritorious, it does not follow that the exclusionary rule should be rejected.

"In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them. Under these circumstances the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."

The three dissenting justices noted that in adopting the exclusionary rule the majority was deviating from the rule in effect in the great majority of states and the British Commonwealths, which rule was supported by "the majority of the most eminent legal scholars." They indicated that they thought the criminal sanctions and civil remedies at present provided by law are sufficient to give the victim of an illegal search or seizure adequate redress.

The dissenters said that the effect of the federal exclusionary rule was often to free obviously guilty persons, and, in addition, the determination of the question whether evidence sought to be introduced had been illegally obtained is often a delicate one, and the determination often requires a lengthy interruption of the trial. In effect, they said, the exclusionary rule deprives society of its remedy against one lawbreaker because he has been pursued by another. They quoted with approval language from the majority opinion of the United States Supreme Court in the Irvine case to the effect that the exclusionary rule was actually only a mild deterrent to the commission of illegal searches and seizures.

The dissenters further asserted that one virtue of the former California rule that could not be denied was its certainty, and that the rule announced by the majority would create great uncertainty. As the majority had stated that "workable" rules were yet to be worked out, there were, in the meantime, no rules to guide the trial courts.

The dissenters would have preferred that the non-exclusionary rule be kept and that the Legislature, for example, consider the imposition of civil liability for the illegal practices upon the governmental unit employing the offending officer, in addition to the liability now imposed upon the officer himself, and that the Legislature consider also fixing a minimum amount to be recovered as damages in the same manner as in actions for invasion of other civil rights (Sec. 52, Civ. C.).

In accordance with your request we would like to add a few comments on the effect of the decision.

In their opinion the majority quote with approval the statement of Justice Black in his concurring opinion in

Wolf v. Colorado, cited above, that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Elsewhere in this opinion the majority justices say that "It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." In the light of these statements it appears that the Legislature could, if it desired to do so, override by statute the rule announced in the Cahan case and restore the rule that formerly prevailed in this State. However, the Irvine case suggests the possibility that the United States Supreme Court, or even the California Supreme Court, may in the future conclude that the guarantee of due process itself imposes the exclusionary rule on the states. Or, if the Legislature favors the exclusion of illegally obtained evidence generally but desires to provide "workable rules" for application of the principle it could do so.

The decision would seem to leave open the possibility that the Legislature could devise means of discouraging illegal searches and seizures that would be so effective as to render the exclusionary rule no longer necessary, though now that the exclusionary rule is in effect in California there might be some difficulty in demonstrating to what extent any such statute, rather than the exclusionary rule, was deterring the commission of illegal searches and seizures, if the two were in effect concurrently.

The dissenters suggested as an alternative to the exclusionary rule the imposition of statutory liability on the governmental unit which employs an officer who makes an illegal search or seizure, possibly with a statutory minimum recovery for the aggrieved party. Statements in the majority opinion indicate that the majority justices would be skeptical of the worth of such provisions. Thus, the majority quoted with approval from the opinion of Justice Jackson in Irvine v. California, 347 U.S. 128, that if an illegal search or seizure turns up nothing incriminating the innocent victim usually does not care to take steps which air the fact that he has been under

Honorable H. Allen Smith - p. 6 - #11342

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suspicion. This suggests the possibility that the court might deem the desire to avoid negative publicity a more important factor than the certainty of a money recovery in determining whether a victim will seek civil redress for an illegal search or seizure.

Very truly yours,

Ralph N. Kleps
Legislative Counsel

By
Terry L. Baum
Deputy

TLB:bc

State of California
OFFICE OF LEGISLATIVE COUNSEL

EXHIBIT II

Sacramento, California
May 15, 1955

Summary of a Comment, "The Federal
Search and Seizure Exclusionary
Rule," 45 J. Crim. L. 51 - #11342

The authors note at the outset that "The Federal law presently is in a state of confusion as a result of the Supreme Court's tendency to treat each case upon its facts without supplying workable standards." However, they set forth what they believe to be certain and discuss the factors which the Supreme Court considers in search and seizure cases and the weight given them.

The Fourth Amendment secures every citizen in his person, premises, papers, and effects from search and seizure which is unreasonable because it is not authorized by law or in accordance with a proper search warrant. A warrant is authorized where there is a showing of probable cause supported by oath or affirmation and the place to be searched and the person or things to be seized are particularly described, that is, general exploratory searches are not permitted.

At common law the admissibility of evidence was not affected by the illegality of the means by which it was obtained, and it was apparently not until 1914 that the Supreme Court announced the rule that use of such evidence is to be precluded upon defendant's seasonable application for the return of things illegally seized or upon motion to suppress (Weeks v. United States, 232 U.S. 383). But the exclusionary rule is limited in scope, in that it does not apply to intrusions by private individuals, and it must be seasonably invoked by a defendant who can show that his own constitutional rights have been invaded, and, of course, the Constitution does not impose the rule on the states.

Summary of Comment, "The Federal
Search and Seizure Exclusionary
Rule" 45 J. Crim. L. 51 - p. 2 - #11342

A search warrant may not legally issue for seizure of property which has evidentiary value only, whereas it may issue for seizure of property in which the government or public has a paramount interest (Gould v. United States, 225 U.S. 298), i.e., a seizure of contracts, letters, or invoices solely for use in evidence in a subsequent criminal trial is prohibited, but seizure of stolen goods, contraband, "instrumentalities of crime," and articles seized to prevent further frauds is permitted. This distinction has been drawn in some nonwarrant cases too.

The Supreme Court has been very firm in upholding the rule that any indirect or derivative use of evidence unreasonably seized is prohibited. For example, in Silverthorne Lumber Co. v. United States (251 U.S. 385), the company's offices were entered, without a warrant, and all records were seized. A motion to return the property was granted. Thereafter the government had subpoenas issued requiring the corporation to produce originals of the returned documents for use in the trial. In reviewing a contempt conviction for refusal to comply, the Supreme Court held that this was indirect use of evidence obtained illegally originally and was prohibited. Similarly, witnesses may not testify to what they see during an illegal search. But facts once illegally gained can still be proved by other independent sources.

The area in which there is the greatest uncertainty is that of the search without a warrant "incidental" to an arrest. The authors summarize the holdings of the cases in this field as follows:

"(1) Search and seizure contemporaneously with an arrest is an exception to the constitutional requirement of a warrant and is strictly a limited right. The basic purposes are (a) to protect the arresting officer and to deprive the prisoner of means of escape, (b) to avoid destruction of evidence by the arrestee, and (c) to gather instruments of the crime.

(2) The search and seizure must be proximate to the arrest in time and physical area. The seized articles must either be in plain view, in the immediate custody of the arrestee, or reasonably accessible without exploring, rummaging or

Summary of Comment, "The Federal
Search and Seizure Exclusionary
Rule," 45 J. Crim. L. 51 - p. 3 - #11342

ransacking. Thus, the conduct of the arresting officers is frequently very important. Where they proceed orderly, and where specificity is the mark of the search the risk of impropriety is lessened. However, the limits of permissible search have never been fully defined although there is a working test of reasonableness for each situation.

(3) The nature of the crime and the character of the seized articles usually controls the disposition of a particular case. Consequently, where the crime is of a continuing nature which is aggravated by possession of contraband or articles the mere possession of which is an offense, there is a tendency to uphold the seizure. Further, seizure of papers or articles, which are public in nature or which are invested with a paramount public interest, is more likely to be justifiable than seizure of private papers. In this connection it will be remembered that there is judicial antipathy towards seizure of articles solely for their evidentiary value.

(4) Finally, although constitutional protection extends to both private and public premises, there is a tendency to protect a private dwelling more than a business or public place."

The authors also note that there are other circumstances under which a search may be made without a warrant, for example, upon a showing of probable cause when it is not feasible to obtain a search warrant (Brinegar v. United States, 330 U.S. 160). In Johnson v United States, 333 U.S. 10, other "exceptional circumstances" recognized were flight of a suspect, situations involving a moving vehicle, or where evidence of contraband is threatened with removal or destruction.

With respect to standing to invoke the exclusionary rule, it is clear that when a defendant does not claim ownership of the premises searched or the property seized he is in no position to resist the admission of seized evidence. There is conflict, however, as to whether interests in both the premises searched and property seized are prerequisites for such standing, but the tendency is to find

Summary of Comment, "The Federal
Search and Seizure Exclusionary
Rule," 45 J. Crim. L. 51 - p. 4 - #11342

sufficient standing if either interest is present.

"Seasonable objection" to unreasonably seized
evidence ordinarily means objection made before the trial.
However, exception is made where the defendant was unaware
of the illegal seizure before the trial.

Ralph N. Kleps
Legislative Counsel

By
Terry L. Baum
Deputy

TLB:fo

"Means and Ends in Law Enforcement"
Superior Judge Stanley Mosk
Town Hall, July 26, 1955

EXHIBIT III

On April, 27, 1955, the Supreme Court of the State of California announced its decision in the case of People v. Cahan.¹ And atomic explosion would not have sprayed as much fall-out as this 4-3 opinion created in the field of criminal law.

On the one hand, many thoughtful legal authorities and students of the law, as well as civil libertarians, rejoiced at what has been termed a return to the spirit of the Constitution in the field of law enforcement. On the other hand, some law enforcement officials have been unrestrainedly critical of the Court and the shackles which it has purportedly placed on the police in their war on crime.

Theretofore in California courts, any evidence against a defendant in a criminal case was admissible in the trial against him, regardless of how obtained -- legally or illegally. Theoretically, a law enforcement officer who violated the law to obtain the evidence could be punished for his illegal acts, but the fruits of those acts were available against the defendant. According to the new rule, evidence illegally obtained is no longer admissible in California courts of law. This exclusionary rule has long prevailed in the federal courts and in some, though not a majority, of the state courts.

The conundrum thus posed to many thoughtful citizens is: Are we concerned exclusively with apprehension of criminals, or do we reflect upon preservation of rights belonging to all of us?

1. 44 A.C. 461

This is somewhat like the early bird who catches the worm: everyone heaps praise on the virtues of the early bird, but no one sheds a tear for the fate of the early worm.

In his majority opinion in the Cahan case Justice Traynor confessed that he felt obliged to reverse his former position and now jointed Justices Carter and Schauer, who have consistently maintained in dissents that evidence obtained in violation of Constitutional guarantees is inadmissible.

In baseball an umpire never changes his decision. On occasion, judicial umpires have been less reluctant to reach what are euphemistically termed revised conclusions. Traynor's forthrightness is matched by the classic expression of Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."² Justice Jackson once found himself deciding a matter as a judge directly contrary to an opinion he had rendered some years previously as attorney general.³ He wrote a concurring opinion in the nature of an explanation, pointing out that precedent "is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others." He quoted a judge, who "extricated himself from a somewhat similar embarrassment by saying, 'The Matter does not appear to me now as it appears to have appeared to me then.' And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error can furnish no ground for its being adopted by this Court.' (Added Jackson) If there are other ways of gracefully and good-naturedly surrendering

2. Henslee v. Union Planters Bank, 335 U. S. 595.

3. McGrath v. Kristensen, 340 U. S. 162.

former views to a better-considered position, I invoke them all."

Some authorities have questioned this right of the Supreme Court to alter a long-accepted legal rule. Justice Frankfurter commented in 1939: "Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation."⁴

Complete reversals are not entirely uncommon, and certainly not necessarily unwise. For a classic example, Chief Justice Marshall in the landmark case of McCullough v. Maryland⁵ used the phrase that "the power to tax involves the power to destroy". Over a century later, Justice Holmes brushed this seductive cliché aside with one stroke of his pen. Said he, "The power to tax is not the power to destroy while this Court sits."⁶

Cahan was convicted of bookmaking. It may seem like a tortuous path from English barons in 1215 to Los Angeles bookmakers in 1955, but the relationship between the two is not as tenuous as may seem at first blush. Neither medieval barons nor modern bookmakers are noted for their civic consciousness, but both unwittingly have made notable contributions to modern jurisprudence and to the rights of all free men.

When the barons wrested from King John the Magna Carta, the 39th article of that great document provided that "No freeman

4. Graves v. New York ex rel O'Keefe, 306 U. S. 466, 487.

5. 4 Wheat. 316

6. Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223.

shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land." Thus there was planted in the stream of English law the germ of an idea which has made an incalculable contribution to the development of our institutions -- "the law of the land" -- per legem terrae.

In the next century, about 1354, a statute of Edward III made it clear that the protection of Chapter 39 of the Magna Carta applied not only to landed gentry but to all men without limitation -- "of what estate or condition that he be". This same statute first used the revered phrase that was adapted by the framers of our Constitution: No man should suffer deprivation in any way except "by due process of law".

The application and identity of the phrases "law of the land" and "due process of law" as inalienable rights of the individual became widely accepted during the early 17th century as a result of the writings of Coke and of John Locke, and ultimately achieved such acceptance as to compel Parliament in 1640 to abolish the infamous Star Chamber.

These ideas came to America as a part of the heritage of our early English settlers, and we had here a soil on which they could flourish. The same phrases were used by James Otis in his great argument in the "Writs of Assistance" case in 1761. They were emphasized again and again by Thomas Paine, John Adams, Samuel Adams, and other revolutionary pamphleteers.

Never should memories dim to the historic fact that our Constitutional guarantees were conceived for the protection of the

individual against abuses by his own government. Essential though law and order may be, ominous though the inroads of crime may be, respect for our American legacy compels us to shelter the individual from an overzealous law enforcement agency.

What were the facts in the Cahan case? The defendant and fifteen other persons were charged with conspiring to engage in horse-race bookmaking in violation of Section 337a of the Penal Code. Charles H. Cahan was found guilty and was granted probation for a period of five years on condition that he spend the first ninety days in the County Jail and pay a \$2,000 fine. He appealed.

According to the evidence reviewed by the Supreme Court, a police officer, after securing permission of the Chief of Police to make microphone installations at two places occupied by the defendants, entered the house during the nighttime, together with two other officers, through the side window of the first floor, and placed a listening device under a chest of drawers. Another officer made recordings and transcriptions of the conversations that came over wires from the listening device to receiving equipment installed in a nearby garage. A month later another officer surreptitiously installed a similar device in another house, and receiving equipment was also set up in a nearby garage.

The evidence acquired from the microphones was not the only unconstitutionally obtained evidence introduced at the trial over defendants' objection. In addition, there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants.

The following is an exact quotation from the opinion of

the Supreme Court: "The forcible entries and seizures were candidly admitted by the various officers. For example, Officer Fosnocht identified the evidence that he seized, and testified as to his means of entry:' . . . and how did you gain entrance to the particular place? I forced entry through the front door and Officer Farquarson through the rear door. You say you forced the front door? . . . Yes. And how? I kicked it open with my foot . . . ' Officer Schlocker testified that he entered the place where he seized evidence 'through a window located I believe it was west of the front door (W)hen you tried to force entry in other words, you tried to knock it (the door) down is that right? We tried to knock it down, yes, sir. What with? A shoe, foot. Kick it? Tried to kick it in, yes. And then you moved over and broke the window to gain entrance, is that right? We did.' Officer Scherrer testified that he gained entry into one of the places where he seized evidence by kicking the front door in. He also entered another place, accompanied by Officers Hilton and Horral, by breaking through a window. Officer Harris 'just walked up and kicked the door in' to gain entry to the place assigned to him."

Continued the court, "Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the City employs and pays them."

No twentieth century police chief or prosecutor would insist upon introducing into evidence a forced confession. And for many years there has been little question about the rights of defendants in situations involving double jeopardy, deprivation of counsel, excessive bail, cruel and unusual punishment, right to public trial, right to trial by jury, protection against ex post facto laws, and even -- with the occasional exception of proceedings before legislative committees -- the immunity against self-incrimination. But unreasonable searches and seizures seem to remain a blind spot in the perception and perspective of many state courts and numerous law enforcement agencies. Why this one Constitutional prohibition merits less respect than the others is difficult to comprehend.

Let us hurriedly and superficially review the history of evidence admissibility in cases before the highest Court of the land.

In 1914 the United States Supreme Court ruled that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.⁷

In 1949 the United States Supreme Court decided that the due process clause did not forbid a state court to admit evidence obtained by an unreasonable search and seizure.⁸ Said the Court in rationalizing this distinction: "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear

7. Weeks v. U.S., 232 U. S. 383.

8. Wolf v. Colorado, 338 U. S. 25.

upon remote authority pervasively exerted throughout the country."

Debatable though that concept may be, it apparently convinced five out of nine of the justices, although Justice Black wryly observed that "A state officer's knock at the door as a prelude to a search, without authority of law, may be, as our experience shows, just as ominous to ordered liberty as though the knock were made by a federal officer."

An indication that limitations upon conduct of state officers would be imposed by the U. S. Supreme Court was contained in the case of Rochin v. California.⁹ In that case, three Los Angeles County deputy sheriffs forced open the door to Rochin's room. Inside they found him sitting partly dressed in the side of the bed, upon which his wife was lying. On a night stand beside the bed, the deputy spied two capsules. When asked, "Whose stuff is this?", Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers jumped upon him and attempted to extract the capsules. Being unable to do so, they handcuffed Rochin, took him to a hospital, and at the direction of one of the officers, a doctor forced an emetic solution through a tube into his stomach against his will. This stomach pumping produced vomiting, and in the vomited matter were found two capsules which proved to contain morphine. Rochin was tried and convicted, the chief evidence against him being the two capsules.

The United States Supreme Court reversed this conviction on the ground that due process had been denied. Said Justice Frankfurter: ". . . The proceedings by which this conviction was

9. 342 U. S. 165

obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience . . . This course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of Constitutional differentiation. It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Justice Douglas, who concurred with the unanimous decision, pointed out however that this type of evidence, which so revolted the sensibilities of the Court, would be admissible in the vast majority of the States of the Union.

It appearing in the Rochin case that the United States Supreme Court finally might take the plunge at prohibiting illegal evidence from being admitted in state courts, the case of Patrick E. Irvine, a Los Angeles bookmaker, went up to the high court.¹⁰ The evidence in the Irvine case again shocked the Court. While Irvine and his wife were absent from their home, a police officer arranged to have a locksmith go there and make a door key. Two days later, officers and a technician made entry into the home by the use of this key and installed a concealed microphone. A hole was bored in the roof, wires were strung to a neighboring garage, and officers were posted in the garage to listen. As Justice Jackson pointed out:

"Each of these repeated entries of petitioner's home

10. Irvine v. California, 347 U. S. 128.

without a search warrant or other process was a trespass and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government . . ."

Repugnant though this conduct was to the Court, it declined to hold categorically that the California court should have excluded evidence obtained in this manner. One justice, Clark, voted with the 5-4 majority because he felt strict adherence to the rule permitting any kind of evidence "may produce needed converts for its extinction". That was a polite way of saying things must get worse before they can get better.

Even though the Irvine conviction was upheld, the Court included a subtle invitation to the states to take the initiative in withdrawing recognition of lawless enforcement of the law. The majority opinion pointed out that thirty-one states at this time were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it, and added: "Now that the . . . doctrine is known to them, state courts may wish further to reconsider their evidentiary rules."

It must be conceded, however, that Justice Jackson in the Irvine case cynically concluded: "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."

On the other hand, Justice Douglas's dissent quoted from the late Justice Murphy that "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing Constitutional demands in his instructions to the police."

Let us briefly examine some of the contentions in favor of admissibility of evidence regardless of its source. The first is: this is merely a technical problem of procedure, not crucial enough to merit Constitutional invocation.

It has not been uncommon for people to say: "I don't like the methods, but . . .", thus drawing a line of demarcation between methods and results, or between substance and procedure.

Perhaps there has been less of this type of rationale in the immediate past, since we have witnessed the results of Communist brainwashing. The "confessions" of captured prisoners indicting America of inhuman germ warfare have vividly demonstrated the procedural evils of forced or induced confessions. Many who may have heretofore believed it impossible to extract a detailed confession

from an innocent person are now convinced that this can be done by devious techniques.

Thus the importance of procedure looms as great today as it did in our historic past. Dean Erwin N. Griswold of Harvard Law School has put it aptly: "For methods and procedures are of the essence of due process, and are of vital importance to liberty ...

"The complaint against the Star Chamber was chiefly one of bad procedures. Torture is a procedure, and inquisition without charge, forcing a witness to testify against himself, and the other things which were standard practice in the infamous Star Chamber would all fall into the category of procedure It is, in last analysis, only through procedural rules that the individual is protected against arbitrary governmental action." No, it may not be said that procedure is a mere insignificant technicality.

A second argument against exclusion of illegally obtained evidence is the necessity for its use in apprehending and convicting criminals, or, in other words, that police work will be ineffectual if circumscribed by Constitutional guarantees.

If some law enforcement authorities are to be heeded, the Cahan case in California has had dire results in this unending war against crime. A leader in the attacks upon the Supreme Court and its decision has been the Chief of Police of our community. I have here a question-and-answer interview with the Chief, published in a daily newspaper of Los Angeles, in which he stated that "our Intelligence reports the criminal underworld is rejoicing over the decision." He further stated that there has been a marked drop-off in arrests "directly traceable to the handicaps" under which the police are working as a result of the Cahan decision. He went on to cite

statistics which purported to indicate felony arrests dropped 21.2% during the month of May over the average of the preceding four months of 1955. His direct quotation on the reason for this was: "It (the Supreme Court decision) is the only factor we can point to. It is the only thing that is different today than prior to the Cahan decision."

If that is an accurate reflection of the situation, there should be justifiable concern to all citizens interested in effective law enforcement.

Frankly, I had not noticed any major crime wave in Los Angeles since April 27 of this year, and this caused me to wonder about the accuracy of the Chief's alarming statistics. For the most authoritative source of information, I turned to a copy of his own annual report for the year 1954, and on page 31 noted arrest bookings month by month for the preceding year. Apparently the Chief forgot to mention in his various interviews and radio appearances that criminal arrests traditionally drop markedly during the summer months. Thus, while in January of 1954 there were 17,163 arrest bookings and in April 16,680, the figure dropped in May to 15,626, 14,414 in June, 13,691 in July. If we take the average for January through April of 1954 we find 16,341 arrests. The average for the following five months, May through September of 1954, numbered 14,329 arrests. That represents an appreciable decrease percentagewise.

I think it is therefore fair to state that there is normally a significant reduction in criminal arrests during the summer months in Los Angeles. No one knows whether this is attributable to crime taking a holiday or police officers taking vacations or some other cause, but certainly no action of the Supreme Court may be held responsible in previous years.

In Los Angeles Superior Court, criminal filings for the

first six months of this year totaled 4,204. This is slightly less than the 4,681 for the comparable period in 1954, but more than the 3,961 for 1953. Such fluctuations are not without precedent and in such moderate degree are not considered noteworthy.

Now, in all fairness it must be said that in certain kinds of crime, the obtaining of evidence will become somewhat more difficult if law enforcement officers must themselves obey the law.

But this and comparable difficulties have not proved insurmountable in the past and should not be in the future to an alert, skilled law enforcement agency. More officers may find it necessary to use their heads instead of hob-nailed boots.

Since the exclusionary rule prevails in federal courts, the Federal Bureau of Investigation has for years operated under that judicial prohibition. Certainly no one would contend that the FBI's usefulness has in any way been impaired by having to adhere to the protection of individual rights guaranteed by the Constitution.

I have here the testimony of J. Edgar Hoover before the House Subcommittee on Appropriations on February 24, 1955. He pointed out that the FBI brought 10,971 cases to trial in 1954. So irrefutable was the evidence which it obtained -- sound, legal, Constitutional evidence -- that there were convictions in 95.8% of the cases.

Perhaps it is unreasonable to expect our local police to operate as efficiently as the FBI, but the record of the federal bureau stands as eloquent rebuttal to those who claim the exclusion of illegal evidence hampers police effectiveness. It may be significant to note that in the curriculum of the FBI National Academy are courses on civil rights and on ethics in law enforcement.

I must state parenthetically that I am using the expression "law enforcement officers" generically, with no intention of being critical of all such agencies. As a matter of fact many have accepted the Cahan decision and properly proceeded to revise their techniques accordingly, District Attorney Ernest Roll being in the forefront of this group. He has prepared for his deputies a splendid manuel on the law of searches and seizures, outlining duties, powers, and limitations in this field.

It must be borne in mind that it is unreasonable searches that are prohibited by the Fourth Amendment and by our State Constitution.¹¹ Framers of the Constitution recognized that there were reasonable searches for which no warrant was required. For example, no one questions the right, without a warrant, to search the person after a valid arrest. Of course, a search without warrant, incident to an arrest, is dependent initially on a valid arrest.

The authority to search an arrested person is permitted for two reasons, both based upon necessity: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, and secondly, to avoid destruction of evidence by the arrested person. From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control.¹²

Another search without warrant considered not unreasonable is that of moving objects, such as vehicles and vessels.¹³ This, too, is on the basis of necessity, courts having held that it is not

11. Article I, Section 19.

12. United States v. Rabinowitz, 339 U. S. 56.

13. Carroll v. United States, 267 U. S. 132.

practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

But when we come to search of the premises owned or occupied by the arrested person, assuming a valid arrest, many problems do arise. The United States Supreme Court majority by 5-4 has held that search of the arrested person's desk, safe, and file cabinets in the room in which he was seized, was a permissible area of search beyond the person proper.¹⁴ The Court used the words "limited search" and established in that situation these five boundaries: (1) The search and seizure were incident to a valid arrest; (2) The place of the search was a business room to which the public, including the officers, was invited; (3) The room was small and under the immediate and complete control of the arrested person; (4) The search did not extend beyond the room used for unlawful purposes; (5) Mere possession of the objects seized, in this instance forged and altered stamps, was a crime.

The Court dismissed the element of time as a fair test. It was urged by the defendant that the officers had ample time to obtain a valid search warrant and return to the premises. The Court said it could not "agree that this requirement should be crystallized into a sine qua non to the reasonableness of a search", for "it is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant."

Thus it seems clear that there may be reasonable searches, incident to an arrest, without a search warrant. There may also be

14. U. S. v. Rabinowitz, supra.

unreasonable searches with a search warrant. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search itself was reasonable. That criterion in turn depends upon the facts and circumstances, or as the Court put it, "the total atmosphere of the case."

Difficult though this ad hoc approach may be, it is not inconsistent with innumerable other statutes and legal proceedings which depend for their validity on interpretation of the word "reasonable."

Desirable though predictability may be in the law, and particularly in the criminal field, it is utterly impossible to anticipate all the factual refinements and nuances that develop. We are not dealing with normal, predictable people in criminal defendants generally, but with inept, inadequate individuals, and the circumstances they generate are abnormal, often bizarre.

Let me illustrate with two recent cases, one of which was tried in my court. Suspecting a certain house to be a hotbed of marijuana traffic, a squad of police descended upon it late at night. Some police officers broke in the back door, others with equal abandon kicked in the front door, still others broke side windows and entered in that manner. Several persons were apprehended inside, and a quantity of contraband was seized.

This entry and seizure was clearly illegal under the Cahan case doctrine. But here comes the real problem. While the premises were still swarming with police officers an hour later, the defendant blithely walked up to the front door and rang the doorbell. Getting no reply, he walked around the side and was about to look

under the side porch -- where, incidentally, some of the cache had been found -- when he was arrested. He was searched and three marijuana cigarettes were found in his shirt pocket.

If the arrest was proper, the search of his person was proper, and the cigarettes found could be introduced into evidence. But, argued this defendant, the original breaking and entering and search of the house were illegal, and every circumstance that flowed therefrom must be illegal and inadmissible.

Several principles enunciated in cases conflicted with the defendant's contentions, however. First of all, only the persons properly in possession of premises may complain about the unlawful entry upon those premises.¹⁵ A casual visitor has no such right.¹⁶ Second, only the person who is illegally seized and held may object.¹⁷ While the persons taken inside this house could complain of that illegal search and seizure, the newly arrived defendant could not do so. Thus the police had information which would cause them to reasonably suspect any late-hour caller at those premises. Acting upon this "probable cause", they had a right to place the defendant under arrest on suspicion, and the arrest being proper, the resultant search of his shirt pocket was also valid.¹⁸ The defendant was convicted of possession of marijuana.

On the other hand, in the Berger case, decided by the State Supreme Court,¹⁹ San Francisco police illegally seized certain records and documents implicating a defendant. There was no question of the impropriety of the seizure, and prior to the defendant's trial,

15. Chicco v. U. S., 284 Fed. 434.

16. In re Nasetta, 125 Fed. 2d 924.

17. Casey v. U. S., 191 Fed. 2d 4.

18. Harris v. U. S., 331 U. S. 145.

19. 44 A. C. 485.

the police were ordered to return all records. Along came the trial, and the prosecutor introduced into evidence photostatic copies of all documents which he had been required to return. He was permitted to do so in the trial court, but the Supreme Court reversed the conviction.

The answer as to what constitutes reasonableness must in the final analysis depend upon the pervasive feeling of society regarding the factors involved. Unfortunately we cannot draw upon any formulated expression of the existence of such feeling. There are no elections or Gallup polls in this field. Nor are there available experts on such matters to guide the judicial judgment. Our Constitutional system, federal and state, makes it the Court's duty to interpret those feelings of society to which the Due Process Clause gives legal protection.²⁰

Still another argument against exclusion is that we can depend upon the restraint of police authorities. I am afraid that in this field too many will find, as H. L. Mencken once said, "Conscience is a still small voice that says, 'I hope nobody's looking'."

Finally, the most cogent argument against the exclusionary rule is that under it the defendant's crime and the officer's flouting of Constitutional guarantees both go unpunished. As Justice Cardozo expressed it: "The criminal is to go free because the constable has blundered", and again, "Society is deprived of its remedy against one lawbreaker because he has been pursued by another."²¹

20. *Haley v. Ohio*, 332 U. S. 596, 601.

21. *People v. Defore*, 242 N. Y. 413, 421.

Justice Traynor devastatingly answered that point of view in the Cahan decision: "When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives." And, he continued, an occasional criminal "does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught".

Despite unthinking criticism of it, the Cahan decision is a landmark of progress in California constitutional history. Long after their detractors are forgotten, Chief Justice Gibson, Justices Carter, Schauer, and Traynor will be remembered for their courage and forthright defense of our fundamental guarantees.

In our democracy we have had a skilled professional army, but never have we relaxed civilian control over it. Similarly we have a skilled professional police force, but it must be the servant of the people, never their master. Only in a totalitarian state are police beyond the reach of the law. Perhaps law enforcement may be

more deadly certain in that climate, but our founding fathers sacrificed efficiency for liberty. It was a wise choice.

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
John F. Aiso, Judge

EXHIBIT IV

January 10, 1956.

The Hon. A. Allen Smith,
Chairman, Assembly Judiciary Committee,
530 W. 6th Street,
Los Angeles 14, California

Dear Sir:

Thank you for your kind courtesy in inviting me to appear before your Committee hearing concerning illegal searches and seizures and laws of arrest as affected by the exclusion decision of the Cahan case, with special reference to enforcement of the law against narcotic offenses.

Following receipt of your invitation, I have done some reading on the subject matter and discussed the problems that we judges face in relation to it, with some of my colleagues with greater personal experience in the criminal law and criminal procedure field. It is our conclusion, after giving the matter some thought, that the problem which faces your committee is more that affecting law enforcement officers than the judge called upon to apply the rule of the Cahan case to the case before him. In that phase of the question we defer to the experts in the law enforcement field and in view of the galaxy of experts scheduled to appear before your committee, we could add very little from our experience. As for the legal arguments pro and con, they appear in the decisions of the Supreme Court themselves.

It is true that the "about face" executed by the Supreme Court in the Cahan case did give us a sense of confusion with reference to the admissibility of evidence in the cases filed prior to the announcement of that rule. It is natural to presume, however, that since that rule has been announced very few cases flying into the face of that ruling will now be filed and come before us.

So far as we as trial court judges are concerned, we look to the appellate courts for rules of evidence to be applied as well as to the statutes. With reference to the particular problem at hand, the Supreme Court does seem to be working out the refinements of its ruling. See for instance: People v. Tarantino, 45 A.C. 617; People v. Brown, 45 A.C. 666; People v. Simon, 45 A.C. 671; People v. Boyles, 45 A.C. 677; People v. Michael, 45 A.C. 776; People v. Martin, 45 A.C. 780; and People v. Gorg, 45 A.C. 800, to date.

It may well be that if the Supreme Court continues to hand down decisions which will serve as our guide posts that these will be adequate to meet the problem at the trial court level.

But there may be repercussions at the enforcement and arresting level of which we may not be aware. But as stated, before we leave this area for the law enforcement authorities to bring to your attention.

That fact that the decision has given new impetus for a re-examination of the laws pertaining to searches, seizures, and arrests in the light of modern day conditions, by the legislature, courts, law enforcement agencies, and legal scholars is something which I think will be of benefit for "ordered freedom" in the long run.

I feel honored to have been invited, but as both my legal practice and experience on the bench has not been as extensive on the criminal side as it might be, I feel that other than what I have set forth above, there is very little that I can contribute to the most important work of your committee.

Respectfully yours,

/s/ John F. Aiso

John F. Aiso

Proposed new sections for Government Code:

§ 50150. A local agency is responsible for any false arrest, false imprisonment, or illegal search or seizure committed by any of its officers or employees during the course of his service or employment.

§ 50151. Any person who has been falsely arrested, or falsely imprisoned, or whose person or premises have been illegally searched by any officer or employee of any local agency acting during the course of his service or employment may bring an action against the local agency employing such officer or employee and may recover his actual damages and (\$500) (\$750) (\$1,000) in addition thereto.

§ 50152. Such actions shall be tried in the county where the arrest, imprisonment, or search occurred and shall be commenced within six months after the commission of the act complained of. No claim need be filed with the local agency prior to bringing suit.

(Cf. Gov. Code §§ 50140-50142. Local agency is defined in Gov. C. section 50001 to mean county, city, or city and county.)

MEANS AND ENDS IN LAW ENFORCEMENT
THE BALANCE BETWEEN EFFECTIVE LAW ENFORCEMENT
AND THE CITIZEN'S CONSTITUTIONAL RIGHTS -
A PUBLIC LAW OFFICER'S POINT OF VIEW

- - - - -

By

ROGER ARNEBERGH, CITY ATTORNEY
OF THE CITY OF LOS ANGELES

- - - - -

Mr. Chairman and Members of Town Hall:

The City Attorney of Los Angeles is the City's legal adviser and advocate in civil matters, but he is also ex officio the City Prosecutor--he prosecutes all misdemeanors committed in the City, whether they be violations of city ordinances or of state law.

Consequently, I am especially concerned with the subject of our discussion today - the balance between effective law enforcement and the citizen's constitutional rights.

Each of us is thankful for these constitutional rights. Each of us, if necessary, would be willing to expend all of our possessions--or even to die--to protect such rights; but would we be ready to do either if some of those concepts were broadened to the degree that law enforcement would be crippled, and the enjoyment of other rights would become more a matter of theory than practice?

This is not as fantastic as it might sound. We, gentlemen, are citizens of a country where the cost of crime to each family is

\$495 yearly; where crime costs \$1.82 for every dollar spent for education; where crime costs ten times what we give to our churches; where the population of state and federal prisons is increasing seven times as fast as the national population; where over two million serious crimes occur within a year; where a murder, manslaughter, rape, or assault to kill is committed more frequently than once every twelve seconds. Are we also thankful that without fear of contradiction we can say: "Our country leads the world in crime?"

Yet, Gentlemen, these are the facts in this country of ours. So you can see that there is reason for those of us who are acquainted with the facts, those of us who have a part in the problem of law enforcement, to be concerned with what we believe will greatly increase the difficulty of coping with crime, and seriously decrease the efficiency of our already overburdened police departments.

At the outset I wish to emphasize that in no way is anything I may say to be construed as criticism of our Courts, and, more particularly, the Supreme Court of California. Our Supreme Court today has some of the ablest jurists ever to occupy that high post.

But it is my deep and abiding conviction that every lawyer--and particularly one in public service--owes a duty to his profession and to society to express his views when he conscientiously feels that the Court, in reversing a long line of cases, has adversely affected the public welfare by unnecessarily hampering the police in the performance of their duties, without a corresponding benefit to the individual members of society.

That is what we believe has occurred in the Cahan case.

To disagree with a majority--or even a unanimous--decision of the Supreme Court in no way indicates a lack of respect for the Court. It merely means a disagreement with the Court's action in that particular case. After all, as we shall learn, the Court frequently has disagreements within itself.

Further, those who a few months ago urged the adoption of the exclusionary rule were disagreeing with and criticizing an unbroken line of decisions of the Supreme Court dating from California's earliest history. If for many years they could argue against the non-exclusionary rule, I can argue against this decision.

Let's get one thing straight right now. Contrary to some insinuations, no responsible public official advocates lawlessness on the part of police, regardless of the seriousness of the crime problem.

Our basic contention is not that police should be permitted to make unreasonable searches and seizures--illegal actions by police officers should not be tolerated.

Our views on this point were made very clear in the petition for rehearing filed in the Supreme Court. Chief Parker has frequently expressed the same view, and long ago implemented it with rules which require officers to obey the law in every respect.

Therefore, the issue is not whether police should violate constitutional rights, but rather what will be the effect if an action taken by them should afterwards be held to be illegal. Shall society be punished, the truth suppressed, and criminals freed, because of the error of a policeman?

Certainly the officer should be held accountable if he wilfully violates constitutional rights. But do not free the criminal.

With these general statements of principle, may I now discuss the aspects of the Cahan case about which we are deeply concerned.

First, the necessarily implied holding that the entries and the seizures of evidence in the Cahan case were unreasonable; and, second, the adoption of the exclusionary rule. That rule holds that when an officer, even one acting in good faith and in reliance upon statutory provisions and previously decided cases, makes a search or seizure thereafter held to be unreasonable, the criminal is freed and, in effect, granted complete immunity from prosecution for his crime because the evidence necessary for his conviction can never be used against him.

You have heard something about this case of the Los Angeles bookmaker, Charles Cahan, before the Supreme Court of California, but you have not heard the full facts, for the very good reason that the Court did not have the real detailed facts in the record before it when it wrote its opinion. This is so because the question of how the evidence was obtained was not in issue before the trial Court, as the exclusionary rule was not then in effect.

Cahan was not a penny-ante bookie. He personally took no bets. He had a staff of employees, runners and sidewalk bookies working for him and he was the biggest bookie in our history. Cahan handled millions of dollars a year, and his net profits were hundreds of thousands of dollars annually. The police were attempting

to break up a big operation, which had in it all of the well known possibilities for racketeering, strong-arm collections (of which we have seen a recent example), and murder.

The police were seeking the "big fellow," the man behind the scenes. How many times have you heard it asked, "Why don't the police go after the real criminal instead of the little penny-ante stooges?"

After his trial, Cahan was convicted, upon completely convincing evidence, and his conviction was affirmed by the California District Court of Appeal.

But, the California Supreme Court granted a hearing and reversed the conviction, on the assumption that the evidence against Cahan had been illegally obtained.

Yet this conviction was possible only by obtaining evidence in the manner condemned by the Supreme Court.

Now another important fact to know when judging the action of our police department in the Cahan case:

Pursuant to our democratic processes, and in accord with our basic concept of separation of powers between the legislative, the judicial and the executive, the Legislature had enacted section 653(h) of the Penal Code to restrict the snooper. It makes the installation or use of dictographs unlawful, but it specifically says that it does not prevent the use of dictographs by a policeman expressly authorized by the Chief of Police when that use is necessary in the performance of his duty in detecting crime and apprehending criminals.

Chief Parker, after being presented with evidence which

convinced him of the need for the installation, and believing such action legal, in reliance upon such section, authorized the dictaphone installations, none of which was made in Cahan's home or in any other building where he had any legitimate interest.

Later, and after the police had positive evidence of the criminal conspiracy and that felonies were then and there being committed, they forced entries and made sixteen arrests.

These, briefly, are the facts in the Cahan case.

The Berger case, reversed simultaneously with the Cahan case, involves different facts. It is interesting for two reasons: First, it is not a bookmaking case, for which some people have little sympathy, although of course a police department may not decide what felonies it will enforce. It was a charity racket in which donations were fraudulently secured, ostensibly to aid a blood bank. Second, in the Berger case the officers went to the district attorney and with him to Court and obtained a search warrant under which they seized the evidence in question.

Only later was it held that the search warrant was improperly issued.

While in the Cahan case there was no warrant, in our considered opinion, based on prior cases, none was required. The persons arrested were engaged in felonious acts at the time, and the officers had reasonable cause to believe such to be the fact. There was material evidence in the possession of the persons arrested which would have been destroyed had the arrests and seizures not been made by surprise, and the officers had reasonable cause to believe that such destruction would be the result of a formal prior

demand for admittance.

After all, evidence of bookmaking, as of dope peddling, can be destroyed as quickly as a toilet can be flushed.

When the Supreme Court reversed the Cahan case we made a careful analysis of the federal cases construing the exclusionary rule, and of cases involving searches and seizures. It was our conclusion that under the true facts the searches and seizures in the Cahan case were legal. Likewise, we concluded that other legal points had not been fully considered by the Court.

Because of this, and the importance of the case, we felt it was our duty to present the true facts, and our views as to the applicable law, to the Supreme Court.

Obviously, there is not time here fully to review the propositions urged upon the Court in that brief, but I should like to mention a few of them.

Our first point was based on Section 4-1/2 of Article VI - a specific constitutional provision limiting the power of the Supreme Court to reverse cases where there is no miscarriage of justice.

Bear in mind that this is a constitutional provision of the highest dignity, adopted by the people from whom the Courts derive their authority.

The Supreme Court did not find that there had been any miscarriage of justice in either the Cahan case or the Berger case. Everyone concedes that both Cahan and Berger were guilty. Why then was it proper for the Supreme Court to disregard this salutary constitutional provision? If adhered to, it would have prevented

a reversal, even assuming it was error to admit the disputed evidence.

A second point in our brief was that the Court's decisions violated the provision in Article III of the California Constitution that no person charged with the exercise of judicial power shall exercise any legislative function.

The majority opinions in the Cahan and Berger cases make it clear that the Court, because the Legislature had not done so, adopted a rule of evidence which the Court thought proper. Yet in California rules of evidence are properly established by the Legislature. The function of the Courts is to interpret the statutes containing such rules, not to make new rules to their liking.

Yet here the Court usurped the functions of the Legislature and itself made the rule, because, as the Court stated:

"The constitutional provisions themselves do not expressly answer the question whether evidence obtained in violation thereof is admissible in criminal cases. Neither Congress nor the Legislature has given an answer."

Obviously, if it is a matter about which Congress or the Legislature could give the answer, then it is a legislative matter. It is a dangerous precedent for the Supreme Court by judicial fiat to make legislation which it thinks advisable, although the Legislature has not seen fit to enact such legislation.

And listen to this statement by the Supreme Court:

"The exclusionary rule is not an 'essential element' of the right of privacy guaranteed by the Fourth Amendment, but simply a means of enforcing that right . . ."

Undoubtedly the majority of people are of the opinion that "enforcement" is the function of the executive.

It is no answer to say that the Court was in favor of the legislative rule it adopted, and that it was dissatisfied with the "enforcement" of existing law. The principle of the separation of powers is the most fundamental in our constitutional structure. Our government is one of checks and balances.

That you may be in favor of the results accomplished by this particular usurpation of power is immaterial. The danger of the precedent is just as great.

We have heard that this exercise of legislative powers by the Court, to fill a vacuum left by the Legislature's failure to act, was necessary to prevent California's becoming a police state. I submit that a police state is one in which a small group has gathered into its own hands all of the executive, the legislative and the judicial power. And I submit to you that a police state is not set up by police officers. The danger of a police state in this country, if there is a danger, lies more in making police officers powerless to prevent the seizure of all power--executive, legislative and judicial--by the type of criminally-minded men who have erected police states in other parts of the world.

A third point which we urged is that the Cahan and Berger decisions will create a chaos of uncertainty and confusion in law enforcement.

The Supreme Court certainly had no intention or desire to create what is now called the "Cahan chaos". In fact, in the view of the four Justices who constituted the majority, it was opening "the door to the development of workable rules governing searches and seizures and the issuance of warrants".

But how is confusion to be avoided while the "workable rules" are being developed?

The three justices who dissented had this to say:

"The majority does not suggest what these 'workable rules' may be, nor how 'confusion' may be avoided. Neither the federal courts nor the few states which adopted the exclusionary rule have apparently found a satisfactory solution to this problem of developing 'workable rules' and it seems impossible to contemplate the possibility that this court can develop a satisfactory solution. At best, this court would have to work out such rules in piecemeal fashion as each case might come before it. In the meantime, what rules are to guide our trial courts in the handling of their problems?" And I might add, "What shall I tell our Police Department? How can I properly advise our officers so that they can conduct themselves in accordance with rules not yet developed?"

We cannot rely on the federal rule, changeable as are the decisions under it, as the California Supreme Court stated it was not bound by and need not follow those decisions.

Indeed, the California rule apparently goes far beyond the federal rule, as the federal rule would not have freed Cahan.

In the dissenting opinion it is further stated:

" . . . this Court, by the sweeping repudiation of its past decisions, launches the administration of justice upon an uncharted course which the trial courts will find great difficulty in following".

The correctness of this prophecy is shown by a preliminary survey of trial court decisions. It is apparent that many startling courses are being set.

For example: A reliable informant took a police officer to a certain address and stated, "They are peddling narcotics like they

have a license, and I scored for 2 cans." The officer knocked. The door was partially opened by a man who attempted to slam it when the officer identified himself. The officer made a forced entry and seized a supply of marijuana. The defendant freely confessed possession and sales. The trial court dismissed the case.

In another case, two officers investigating narcotics accosted a suspect in the hallway of an apartment house. The suspect popped an object in his mouth and ran. A struggle ensued, the officers held the suspect's jaws, and removed a package containing 36 capsules of heroin. The suspect pleaded guilty to a narcotics charge but his plea was set aside and the case was dismissed.

Incidentally, had the officer permitted the defendant to swallow the heroin it would have been a fatal dose, so by saving the dope peddler's life the officer violated his constitutional rights.

In yet another case, an officer, pursuant to certain information, went to an address. A person on the front porch stated that he had just bought marijuana from a man inside the house. The officer, while knocking on the door, observed a man running into the kitchen. The officer forced entry and arrested the man. One hundred and five grams of marijuana were recovered from a closet in the kitchen. This man confessed being a dope peddler. The trial court found him not guilty upon the basis of the Cahan decision.

Here, as in all cases where the trial ends in finding the defendant not guilty, the Supreme Court will never have an opportunity to formulate the "workable rules" forecast by the majority, because the prosecution cannot appeal a "not guilty" decision.

Another case was dismissed because the officers did not knock and announce who they were before making an entry to a place where a felony was in process of being committed.

In yet another case a defendant had entered a guilty plea prior to the Cahan decision. After the Cahan decision, when appearing for sentence, the defendant was permitted to withdraw the plea of guilty, enter a plea of not guilty, and the case was then dismissed.

In still another case, an informant gave officers his code name and the phone number of a bookmaker with whom the informant had placed bets. The officers then consulted with the district attorney's office as to how they could legally effect the arrest of the bookmaker. In accordance with the advice received, one officer stationed himself near the entrance. His brother officer phoned in a bet from a vantage point where he had the premises under observation. As he was phoning the bet, the officer signaled his partner, who identified himself, announced his purpose, and entered. The sole occupant was apprehended in the act of destroying bookmaking paraphernalia. The trial court dismissed the case, stating no forced entry was legal without a search warrant.

Seemingly, some courts assume that the Cahan case holds that no entry is legal unless made with permission, or pursuant to a search warrant. Assuming this to be correct, let us consider its impact upon police work.

A police officer walked towards a young man on the sidewalk. Without warning, this man drew a gun and shot the officer to death. Other officers started a systematic search to find the killer.

Some questioned householders, other searched back yards, garages and outbuildings. No officer stopped to ask permission. No search warrant could have been obtained because the killer could not have been identified nor could the property to be searched have been designated. The killer was found hiding behind a doghouse on private premises.

Here a desperate killer was quickly apprehended--but numerous entries on private property were made without permission. Should we hereafter order our police not to conduct such an immediate search?

Calls reporting prowlers are received dozens of times every day. The neighborhood is searched and frequently a wanted criminal is caught or a crime is prevented. Should this practice be stopped unless the prowler is found on the premises of the person putting in the complaint, which rarely occurs?

Calls that a neighbor has not been seen or heard from for some time are frequent. In investigating, a forced entry is sometimes made. Under these circumstances it is obvious that no search warrant could be obtained. Yet murders, suicides and other deaths have been discovered in this manner. Shall we now wait until stench of the dead body becomes a nuisance which can be abated?

If so, what will happen where there is a person helplessly sick, or unconscious?

You say this is different: that such an entry is proper. Our friends who rejoice in the Cahan decision, if consistent, would disagree. If a forced entry cannot be made when a felony is in progress, where is the authority to enter to satisfy a neighbor's

curiosity?

Consider one more case. A telephone call was received from the mother of a prominent actress. She stated that she had just talked with her daughter and had concluded that her daughter was committing suicide.

There was no time to verify if the caller was in fact the mother. In any event, she could not legally have given permission to enter her daughter's home.

Officers rushed to the address given. They knocked but received no answer. An entry was forced. They found the unconscious form of the actress. She was rushed to the receiving hospital. There, still unconscious, her stomach was pumped.

Her life was saved. Newspapers headlined the case. Many considered it a fine example of prompt police work.

But wait-- under the construction being placed on the Cahan case, we find that our officers were heinous criminals. No crime was being committed by the actress or anyone else. But a forced entry was made without permission in a private home -- the sleeping quarters of a beautiful woman were invaded. She was carried bodily from her own home and subjected to the indignity of having her stomach pumped. Yet the United States Supreme Court excoriated deputy sheriffs for pumping the stomach of a dope peddler who while under arrest swallowed dope to destroy evidence--in itself an illegal act--and freed the peddler.

So under the latest decisions, we find that our officers may have committed at least the following crimes:

Burglary (Irvine case)

Forcible entry

Kidnapping

False imprisonment

Battery

Speeding

Rather an imposing list of crimes--and what about the doctor? Well, he is probably guilty only of false imprisonment, assault and battery.

So we see that the most disturbing aspect of the Cahan decision is that it is interpreted to prohibit police work which is necessary if we are to have effective law enforcement.

At the least, it adds further confusion and uncertainty in the field of arrest, search and seizure.

If police officers are to act effectively and aggressively in preventing crime and apprehending criminals, they must know with reasonable certainty as to what should be done, and what should not be done, in the performance of their duties. To tell them this will be decided upon an ex post facto basis is small help and no comfort, in view of the astounding fluctuation and division in court decisions.

Reference to search and seizure cases of the United States Supreme Court reveals a striking situation:

For example:

Olmstead v. U.S. (1928)	5 to 4, each dissenter announcing his reasons in 4 separate dissents.
Goldstein v. U.S. (1942)	5 to 3, one not participating.
Goldman v. U. S. (1942)	5 to 3, one not participating. The dissenters announcing their reasons in 2 separate opinions.

Wolf v. Colorado (1949)	6 to 3, one of the majority stating his reasons in a separate opinion; the dissenters announcing their reasons in 3 separate opinions.
Brinegar v. U. S. (1949)	6 to 3, one of the majority stating his reasons in a separate opinion.
Stefanneli v. Minard (1951)	7 to 2; two of the majority concurred in an opinion based on reasoning separate from the majority.
On Lee v. U. S. (1952)	5 to 4; each dissenter gave his separate reasons in a separate opinion, and, as if that were not enough, one dissenter also concurred with one other dissenter.
Irvine v. California (1954)	5 to 4; one of the majority gave his reasons in a separate opinion; the dissenters could not agree either and split upon their reasoning into two separate opinions. This decision is more properly characterized as a 4-1-2-2-decision, than a 5-4 decision.

Consider the Trupiano case. A federal agent, present with the consent of the property owner, noticed the odor of fermenting mash coming from a building. On moving closer he saw an illicit still in operation. He entered, placed the defendant under arrest and seized the still. In a 5 to 4 decision the court held that the evidence obtained should have been suppressed because there was no search warrant.

The enduring certainty of the law there announced guided our law enforcement officials for the lengthy period of some twenty months when the court in the Rabinowitz case, by a 5 to 3 decision, expressly overruled the Trupiano case.

When the highest court in the land tells the law enforcement officer now its 5 to 4 this way and now its 5 to 4 that way, is there any wonder that the policeman is perplexed? Should he be unwise enough to make a decision that a particular seizure would be illegal, whereas only 4 of the 9 Supreme Court Justices would have later concurred with him, he has failed to perform his statutory and sworn duty of apprehending criminals and preventing crime. He may thereby be subject to both criminal prosecution and disciplinary action for failure to do his duty.

But on the other hand, if he should decide to make a seizure, and only 4 of the Justices should later agree that it was a reasonable seizure, and the other 5 should hold it unreasonable, then the officer is viciously attacked, maligned and castigated for his hobnail boot technique, and likewise may be subject to both criminal prosecution and disciplinary action. All this because he missed by one the number of Supreme Court Justices who would agree with his spur-of-the-moment judgment.

But add to this confusion the exclusionary rule and we have confusion worse confounded. For now the public is vitally affected.

Suppose the officer makes a search or seizure which is later held to be unreasonable - why the dumb cop, with hobnail boot technique, whose judgment is so bad that only 4 of the nine members of the Supreme Court agree with him, has by his unreasonable search forever granted to the criminal immunity from prosecution for his crime.

Of course, if the officer is one of our smarter officers whose judgment will be backed by 5 of the 9 Justices, then everything is all right..

But when the Supreme Court reverses itself, and a majority view of yesterday, holding a search reasonable when made, becomes the minority view before the case reaches the court, it is a little difficult for even our smartest officers.

To me it seems preposterous that our administration of criminal justice is so uncertain and confused, and that a criminal may be turned loose, forever freed from prosecution for his crime, because a police officer in good faith made a search or seizure held to be reasonable by 4 Justices of the Supreme Court, whereas 5 held it to be unreasonable.

That is our objection to the exclusionary rule.

We strongly feel that the problem created by the uncertainty of what is reasonable search or seizure should not be permitted to destroy the effectiveness of our police force, nor the expeditious handling of criminal cases, as is the result of the exclusionary rule.

We have heard that some states have adopted the exclusionary rule. What has been their experience?

In a recent issue of the Journal of Criminal Law, Criminology and Police Science, published by the Northwestern University School of Law, there appeared an article reviewing the experience in Illinois, under the exclusionary rule. First of all, as to the effectiveness of the rule in accomplishing the only justification for its existence--that of stopping illegal searches and seizures--it is stated.

"A study of the records of Branch 27 of the Chicago Municipal Court--popularly known as the 'Racket Court' --

for the year 1950 indicates that the rule has failed to deter any substantial number of illegal searches. In 4,673 out of 6,649 cases the legality of the method of obtaining evidence was put in issue by the defendant. In 4,593 of these cases the court determined that the search had in fact been illegal and granted the motion to suppress the evidence. No cases were found in which a conviction was secured despite the suppression of the evidence."

In other words, in 69.1% of the cases a motion to suppress the evidence was made. In 98.3 of these cases the motion to suppress was granted. In cases where a motion to suppress was made, it was granted in 90.8% of concealed weapon cases and in 100% of narcotic cases!

The article further stated:

"From observations made in the Court, it is obvious that the police are aware of the requirements of the rule. Indeed, in gambling cases, their testimony seems calculated to insure the exclusion of the seized evidence..."

and, further:

"While corruption may be a factor in the type of testimony given by the officer, or in inducing him to make an illegal raid, rather than a legal one, when the 'heat is on', it is difficult to prove. It should be noted that a police officer may immunize a criminal from prosecution by an illegal search, since evidence illegally seized may never be used. If the evidence illegally seized is the only evidence, the criminal must go free."

So it may be reasonably concluded that the exclusionary rule has been used in Chicago as a means of intentionally granting immunity to criminals. In any event, it has accomplished no purpose beneficial to society.

And what about the neighboring state of Michigan.

Don S. Leonard, former commissioner of the Michigan State Police and former commissioner of the Detroit Police Department, discussing the effect of the exclusionary rule in Michigan, recently stated:

"The exclusionary rule has been in effect since the adoption of the State Constitution. Under that rule many notorious gangsters and gunmen were freed from charges of carrying concealed weapons. The People of Michigan became incensed, feeling that constitutional guarantees were to protect good citizens, and not to cloak dangerous criminals with immunity. The result was that in 1934, the People adopted a constitutional amendment which deprived gunmen of such protection by providing that pistols and weapons seized outside the curtilage of a dwelling would be admissible in evidence.

"Two years ago the People of Michigan, alarmed at the increase in narcotics traffic, passed a similar amendment to the Constitution as applied to the seizure of narcotics.

"These two constitutional amendments provided by an incensed public have increased the ability of the People of Michigan to cope with the criminal army."

The police have been criticized because they did certain things without search warrants. It is a very strong argument in the mind of the uninformed--particularly when the search warrant procedure is contrasted to the hobnailed boot.

The trouble with the whole argument is that it assumes that a search warrant could have been obtained, when it could not have been, and it assumes that the police arbitrarily barged into a place, when in fact they did not.

Now, why couldn't a search warrant have been obtained?

Because our Penal Code states that "a search warrant cannot be issued ~~but~~ upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." The man making the affidavit must be able to describe certain property at a particular place from his own knowledge. He must know the property is there.

That is not the only limitation on search warrants. There is no authority for a search warrant to get property which is only evidence of a crime, and numerous courts have held invalid search warrants which described only evidentiary material.

One final point should be noted. We have heard of Communist brain-washing, of the torture chamber, and forced confessions. That these would be mentioned as support for the exclusionary rule illustrates how little understood is the true effect of the exclusionary rule. Comparison has been made between the exclusionary rule and certain constitutional guarantees, such as the right to counsel, the right to a public and speedy trial, the right to refuse to give incriminating testimony.

All these constitutional guarantees are for the purpose of assuring that the real truth will be ascertained. We all know that there is no assurance of the truth of a forced confession. Likewise public trials and right to counsel are for the purpose of ascertaining the truth--not for the purpose of suppressing the truth.

But at the other extreme the exclusionary rule is made operative by a motion to suppress! And what is suppressed? Physical evidence, documentary evidence, evidence that is the absolute truth!

The exclusionary rule is in direct conflict with all our other procedures--with all our constitutional safeguards which are designed to assist in the ascertainment of the truth. Even the most avid defender of the exclusionary rule could not be so deluded, or dishonest, as to even suggest that such rule is for the purpose of discovering and proving the truth. On the contrary, it is used only by those who would be destroyed by the truth.

America and Americans need a reawakening. It is not the criminal who needs protection from the police. It is the law-abiding citizen who needs protection from the criminal.

We must rid ourselves of the fantasy that the police and the citizenry are somehow opposed to each other. All too often in this field we find the problems cast in the form of a war between the police and society rather than the true situation of a struggle between society and the criminal. We must cast off the childish delusion that the problems of modern-day law enforcement are but another form of the game of "cops and robbers". Let us face up to the fact that crime is, indeed, a "dirty business", but it is our business. We should be thankful that the police are willing to do

the job of fighting it for us.

When they lose a battle, it is our battle. If they lose a war, it is our war. The enemy is none the less real because he operates singly, or in small groups, nor is the danger less great because he operates under cover.

The problem is to define the authority of law enforcement officials in terms adequate to their task, without enlarging such power in derogation of legitimate individual liberties. That problem needs the application of realism as well as idealism for its solution.

EXHIBIT VII

ADDRESS OF J. FRANK COAKLEY,

District Attorney of Alameda County,
at the Judges' Conference
During the Annual Meeting of
the State Bar of California
at San Francisco on September 13, 1955.

The majority opinion in People v. Cahan has resulted in confusion among judges, law enforcement officers and district attorneys. The reason for this reaction is that there are serious defects in the majority decision. Concerning the Cahan case, it is probably superfluous and somewhat of an understatement for me to say that I find myself in agreement with the dissenting opinion. Incidentally, that dissenting opinion, written by Justice Spence and concurred in by Justices Shenk and Edmonds, reads in part as follows:

"Furthermore, I cannot ascertain from the majority opinion in the present case the nature of the rule which is being adopted to supplant the well-established non-exclusionary rule in California."

I mention this to indicate the difficulty of our assignment to solve in a few minutes the myriad and diverse problems in the Pandora's Box to which Judge Bray referred.

If these three members of the Supreme Court are confused and unable to ascertain from the majority opinion the nature of the rule or doctrine of the case, I am wondering how we can be expected to say how the case should be applied. As a precedent or guide, the majority opinion is of little, if any, help. The facts are too meager and inadequate. This, of course, is a conclusion on my part which could be implemented if time permitted.

The letter which I received from Judge Bray described the subject to be considered by this panel as follows:

"How should the doctrine of People v. Cahan be applied? This includes a discussion of whether the federal rule should be applied, the procedure to be adopted, motions in advance of trial to determine admissibility of evidence, and the other questions which naturally follow from the doctrine that evidence secured by unlawful search and seizure is inadmissible."

I construe the subject of this discussion, as stated by Judge Bray, to mean that we are here not to bury Cahan, but to try and find a way of living with him - a way, so to speak, of putting meat on the bare bones of the skeleton and of breathing life into the body with which we are compelled to live whether we like it or not.

However, I would be remiss if I failed to state unequivocally that I disagree with the result reached by the majority opinion, particularly the complete and unqualified reversal of People v. LeDoux and People v. Mayen and the adoption of the exclusion rule as the law of California.

Incidentally, I disagree also with certain remarks in the majority opinion such as, "The courts under the old rule have been constantly required to participate in and, in fact, condone the lawless activities of law enforcement officers" and "a system that permits the prosecution to trust habitually to the use of illegally obtained evidence" I submit that an examination of the records of the thousands of cases tried in our courts and of the records in the thousands of cases which have reached the appellate courts of this state will show that the number of cases is relatively few in which a claim was made that evidence was obtained illegally.

Regardless of one's view as to the wisdom of the exclusion rule, the majority opinion, considered simply as a legal opinion and as a piece of juristic craftsmanship, is unsatisfactory as a

guide to the bench and bar, and to law enforcement officials.

For those inclined to the theory that a case is no better than its facts, it is a poor guide because of the incomplete statement of the material facts and circumstances of the illegal, multi-million dollar, syndicated chain-store gambling operation and conspiracy to which six defendants pleaded guilty and seven others, including Cahan, were convicted.

In spite of the fact that the case involved a colossal organized crime type of criminal conspiracy in which investigations involving many policemen and hundreds of hours were made, no mention is made in the majority opinion as to whether an arrest was made, legal or otherwise, when the officers entered and found the evidence, nor does the majority opinion contain any discussion of facts relevant to the question of whether the officers had reasonable cause to enter for the purpose of making an arrest.

The facts stated in the majority opinion as the basis for the holding with respect to the evidence obtained via dictagraphs are likewise insufficient to serve as an adequate and fair guide or test. According to majority opinion, one of the microphone installations was "surreptitious" which, of course, is a pure conclusion and obviously little, if any help to a trial judge or counsel trying to determine whether the facts of a particular case make certain evidence admissible or inadmissible.

Frankly, I cannot tell from the majority opinion whether it means to hold that any evidence obtained by means of a dictagraph is illegally obtained as a violation of what the opinion refers to as a constitutional right of privacy, or whether it means to

hold Section 653h of the Penal Code unconstitutional.

It is little wonder that Justice Spence and the two concurring Justices are confused and unable to "ascertain from the majority opinion . . . the nature of the rule which was (is) being adopted to supplant the well-established non-exclusionary rule in California."

All of which adds up to the fact that as a precedent, the Cahan case is a poor one and from a "doctrine" standpoint, the task prescribed by Judge Bray of discussing how the Cahan case "doctrine" should be applied is very difficult, if not impossible.

Generally speaking, one might say that the theme, the gist of the doctrine, if you will, of the Cahan case, is as stated by Judge Fox in the recent case of People v. Coleman, namely that evidence obtained by police officers in violation of the federal and state constitutional prohibitions against unreasonable search and seizure is inadmissible. To put it another way, it might be said that the majority opinion in the Cahan case judicially legislated out the age-old, time-tested non-exclusionary rule of evidence and imposed upon California the exclusionary rule with the admonition that the federal cases, with their "needless confusion" and "needless limitations" shall not be binding on California courts. In other words, the Cahan case leaves us in the position of starting from scratch without any specific rules to control the game. We must make them up from day to day as the game progresses.

Under the circumstances, with respect to the application of Cahan or its alleged doctrine, I can only suggest a few areas,

situations and problems which should be considered and, if time permits, I may indicate in a general way how they should be handled.

One situation of considerable practical importance to policemen is the matter of consent to entry of a building by police where they do not have a warrant of arrest or a search warrant, and the question of what constitutes implied consent or coercion. In this area, I believe that a more liberal interpretation of consent, and a more limited interpretation of what constitutes implied coercion, than those contained in the federal cases, are needed.*

This involves a situation where a policeman knocks on the door or rings the bell, identifies himself and is admitted, and after such admission searches the premises without objection. The question is whether the evidence obtained under such circumstances is admissible.

Another problem in need of clarification is that of the location from which evidence may be legally seized. For example: A and B are in A's apartment. Officers make a valid arrest and as an incident of the arrest, search and seize evidence in the apartments of both A and B, B's apartment being located in another building. I think that consideration should be given to a more liberal handling of this situation than is contained in the federal cases such as Agnello v. United States, 269 U.S. 20.

* United States v. Slusser, 270 Fed. 818 (officers went to defendant's residence and after admittance displayed badge and said they were there to search for liquor. Defendant said, "All right; go ahead." Held, search was not consented to but could be attributed to "peaceful submission" to the officer); Amos v. United States, 255 U.S. 313 (officers were admitted by wife of defendant upon telling her they

Another area of confusion involves the type of evidence which may be legally seized at the time of arrest without a search warrant. Where evidence of guilt, such as records, papers, letters, etc., as distinguished from the means of committing the crime or the fruits of the crime, is obtained by police as an incident of lawful arrest, should such evidence be admissible? I believe that it should. There is no statute now in existence in this state which expressly limits the type of evidence which can be taken as an incident of lawful arrest as in the case of a search warrant. In the absence of a statute expressly limiting what may be taken, the court should hold that any competent, relevant, material evidence is admissible and the law with respect to search warrants should be broadened to conform.

Another area concerns the search of an automobile where an arrest is made for a minor traffic offense, or the search of an automobile for contraband, such as narcotics, counterfeit money, illegally smuggled goods, etc. In the case of the arrest for a minor traffic offense, should the traffic officers or policemen be allowed to search the automobile and the driver and, if he finds evidence of another crime, should it be admissible evidence in the prosecution of the driver or occupant for such other offense?

In the case of the search of an automobile for contraband where the officers have reasonable and probable cause to believe that the automobile carries contraband, should they be allowed to search the occupants for incriminating evidence, and if the same

were Revenue Officers and had come to search premises "for violation of the Revenue Act." Held, implied coercion nullified purported consent).

is found, should it be admissible?

Another question in this area is whether, assuming there was reasonable cause to search the automobile and after a search no contraband was found, should a search of the occupants of said automobile be legal and if any evidence is found of an incriminatory nature, should the evidence be admissible in the prosecution of the occupant?

Another area or problem to be considered is who should have a right to raise the point of legality of the search and seizure and of admissibility. For example: if D is in T's home as a guest, officers on information not amounting to reasonable cause enter T's home and see D smoking a cigarette which they recognize as marijuana, assuming that D is arrested, should he be allowed to object to the admission of the testimony of the officer and the seizure of any incriminatory evidence because of the questionable entry of T's house?

Still another problem in need of clarification concerns the situation where the evidence is obtained by federal officers or private persons. As to this, should the federal rule be followed or rejected?

The question also arises of whether there should be different tests for different offenses as, for example, narcotics violations. Should there be a more liberal interpretation of the doctrine of reasonable cause in a narcotics case?

Another problem area involves the circumstances of the arrest and what constitutes such reasonable cause as will legalize a search and seizure incident to such an arrest. This is a wide

field and a complex one.

Another area concerns the legality of search warrants and what evidence should be obtainable on a legal search warrant. In this area, the question arises as to whether records, documents, books, etc., used in the operation of an illegal business, which are not, strictly speaking, a means of committing a crime or the fruits thereof, but are more or less integrated with the business, may be legally seized and admitted in evidence. There is very little case law on this subject in California, in fact, only eight cases. Should the interpretation in this area be strict or liberal, or should it be determined by the Legislature by an amendment to the section of the Penal Code which prescribes the grounds for the issuance of a search warrant and the property which may be taken.

Another problem somewhat collateral in nature concerns an arrest based upon information of an undercover agent and the question of whether the undercover agent must be identified or uncovered,* and the question, if he is not uncovered, whether the arrest based upon his information is legal. Similar questions concern the search warrant and the affidavit upon which it is based.

Another area and problem concerns the factors of time and opportunity to obtain search warrants, and the question of whether or not, if the arrest is legal and a search incident to the arrest without a search warrant is made, whether the evidence obtained upon such search is admissible if it appears that the officer had sufficient time and opportunity to obtain a search warrant.

There are no doubt other areas, situations and problems to be

* People v. Gonzales, 136 ACA 475 (Oct. 21, 1955) Deputy Sheriff need not disclose name of confidential operator who introduced him

considered, but time does not permit a statement of them.

Suffice to say it will take a long time and numerous decisions involving a wide variety of factual situations and the application of plenty of common sense to provide adequate guidance for trial courts, attorneys and police.

Concerning a procedure before trial to determine the admissibility of evidence such a motion to suppress evidence, federal rules provide for a motion to suppress. The application of this rule in the federal courts has been anything but uniform and consistent. The same is true in state courts which have the exclusion rule and the motion to suppress procedure.

However, in a jurisdiction where the exclusion rule prevails, I believe the law and rules of court should provide for motion to suppress and fix a time period before trial not later than which such motion may be made excepting, of course, the situation where the defendant or counsel learn of the evidence for the first time later.

In conclusion, may I say that recently I discussed the exclusion rule with two eminent authorities on criminal law and procedure, one Professor Inbau, Professor of Criminal Law at Northwestern University Law School, Chicago, the other, Professor Waite, Professor of Criminal Law, Michigan University Law School. Illinois and Michigan have had the exclusion rule for some time, plenty of time in which to appraise its effect.

Both Professors Inbau and Waite unqualifiedly say that the to defendant suspected of being a narcotic peddler.

exclusion rule has utterly failed in these states to accomplish its avowed purpose of disciplining police. Cases have had to be dismissed because of the manner in which otherwise legal and relevant evidence was obtained. The ultimate result being that the courts were discredited and blamed by the man on the street who did not understand the legal technicalities involved, which confirms the thinking of such authorities as Wigmore, Mr. Justice Cardozo, Chief Justice Taft, Mr. Justice Jackson and others, which confirms also the wisdom, down through the centuries since the Magna Carta, of the judges of the countries of the British Empire and the courts of thirty states of the United States, in approving and adhering to the rule of non-exclusion.

CALIFORNIA LAW OF ARREST

Suggested Revision of. (Preliminary Report)

The problems encountered and the remedies available to police officers in California have, in some respects, outrun the written law. This is not surprising when it is noted that the pertinent statutes have not been materially altered since 1872. Since then, a number of innovations have had considerable impact on the techniques of lawbreaking and law enforcement. Actually, the California law of arrest is a good deal older than 1872, since it is based almost completely on provisions of the proposed code of criminal procedure reported to the New York legislature in 1850, which, in turn, had its roots far back in the common law. What is even more significant than the gulf that lies between the arrests of a century or two ago and the technologically complicated world of today is the emergence, since the days when the rules were being evolved, of vastly expanded structures of organized crime on the one hand and professional law enforcement agencies on the other.

The law of arrest by peace officers illustrates the discrepancy between existing statutes and the developments in case law which have attempted to keep pace with the modern requirements of law enforcement. The former not only antedates the modern police department, but was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial. Today, with few exceptions, arrests are made by police officers, not civilians.

Typically, they are made without a warrant by officers in patrol cars, often in response to requests coming over the police radio, sometimes from distant cities. When a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station. As a result of the antiquated statutes the general public and most law enforcement officers have no readily available source of information as to the law of arrest. They are required to search the records of reported cases in the State of California in order to determine the modern interpretations of the law which in some instances affirms and in others modifies or even contradicts the language of the statute. It is with a thought of reducing these interpretations to codify the law in keeping with requirements of modern law enforcement that the following amendments are suggested.

Such considerations led the Interstate Commission on Crime to decide that a study of the law of arrest should be made in order to determine the possibility of drafting a model act to reconcile the law as written with the law as applied. A committee was appointed in 1939 and as a result of the combined efforts of judicial and law enforcement officers, a proposed Uniform Arrest Act was devised. In 1941, the Interstate Commission on Crime and the International Association of Chiefs of Police approved the general principles of the Act. The principles embodied in this model act were adopted by the following states, New Hampshire, Rhode Island, Delaware, and Massachusetts. In preparing these amendments we have patterned them on the Uniform Law of Arrest as well as decisions of our appellate courts which have interpreted our present statutes.

Section 832. Questioning and Detaining Suspects.

This is a new section incorporating a principle set forth

in subsection 2 of the Uniform Arrest Law and which right was recognized as common law and although never incorporated into the statute law of California has been enacted in Massachusetts, (Massachusetts General Laws, 1932, Chapter 41, Section 98) and New Hampshire (New Hampshire Public Laws, 1936, Chapter 36, Section 12 and New Hampshire Public Laws, 1941, Chapter 163). In California the right to detain without arrest is recognized in the case of Gisske v. Sanders 9 Cal. App. p. 13 and Pon v. Wittman 147 Cal. 282. The first case involved the right of a police officer to stop, question and take a person to the police station for further questioning, under suspicious circumstances. The Pon v. Wittman case involved an injunction sought to prohibit police officers from questioning persons approaching a house of prostitution.

It is to be noted that Penal Code Section 836 does not, according to California cases, contain an exclusive list of lawful arrests, to wit, People v. Ballen 21 Cal. App. 770, where the court stated that although not contained in any statute there was no question as to the right of a peace officer to arrest a person about to commit a felony and in People v. Hupp 61 Cal. App. 2nd at 447 and Cristal v. Police Commission 33 Cal. App. 2563 to the effect that officers could make an arrest to prevent the commission of additional crimes and to protect citizens' lives.

Section 833. Searching for Weapons Persons Who Have Not Been Arrested.

The law recognizing a universal right to search arrested persons for weapons is based on two reasons, first of which is applicable to searching a person who is detained for questioning only. "No matter how innocent the person may appear there is always a possibility that he is armed and the officer is not required to

run the personal risk of holding a person in custody without finding out by the only sure method -- a thorough search." Mechem Law of Search and Seizure, p. 62, citing People v. Cheagles 237 New York 193, 142, Northeast 583. It is to be noted that the lack of a right to search before arrest springs from the days when arms were swords, bows or arrows. Had hoodlums of that day been armed with 4-inch pistols there would have been no such distinction.

Section 834a. Resisting Arrest.

This is a new section incorporating the principles of Section 5 of the Uniform Arrest Law. Although no statute in California prohibits resistance the courts have stated their views in the following language: "It is the duty of a citizen to obey the commands of a peace officer given in his line of duty. If the officer is exceeding his authority, the recourse of the citizen is to the courts, and not to open resistance." People v. Yuen 32 Cal. App. 2d, 151. In People v. Spear 32 Cal. App. 2d, 165 the court stated, "The law does not countenance a breach of the public peace in order to enforce a private right. Courts are created for the purpose of determining those rights, and any other rule would result in private battles going on at various times and place, to the great inconvenience of the general public. Such a rule is not to be accepted or approved."

Section 835a. Arrest. Permissible Force.

This is a new section incorporating the principles of the Uniform Arrest Law but modified to meet California requirements and simplified to reflect the consistent holdings of the appellate courts concerning the use of force in connection with arrests, escapes and resistance. In each case the question before the court has been one of reasonableness, therefore this section is based

entirely upon the use of a reasonable force under the circumstances.

Section 842a. Arrest Under a Warrant Not in Officer's Possession.

This is a new section incorporating the principles advocated by the Uniform Arrest Law, Section 8. The present requirement of Section 842 is virtually impossible in performance in a large municipality where there are many police officers. A warrant is generally held in the main office and it is a rare exception that the police officer has the warrants on hand at the time he has the opportunity to make the arrest. This section will enable him to conform to the requirements of Section 842 by producing his warrants within a reasonable time.

Section 849a. Release of Persons Arrested.

This incorporates Section 10 of the Uniform Arrest Law which is a practical approach to a current problem facing large municipalities and smaller communities on occasion. Under the present California law an arrest once commenced must be carried through in order to give the officer any protection from civil liability. This new section recognizes that many arrests are made upon valid grounds and that prior to completion of the arrest the suspicion motivating that arrest is removed. This will allow law enforcement officers to legally release persons at the moment the probable cause for the arrest is dissipated. It will further authorize a procedure now practiced in the interests of expediency and justice, namely, the releasing of minor offenders such as intoxicated persons at the first moment they can be safely trusted upon the street. The justification for this measure rests mainly on humanitarianism, economy and general expediency. Paragraph "b" provides the framework for future regulations permitting a like

disposition of certain minor misdemeanors upon citation rather than immediate arrest, such as is found in the Vehicle Code.

It is recommended that the following sections be amended to read as follows:

Section 835. How an Arrest is Made and What Restraint Allowed.

It is suggested that the section is amended by striking the entire last sentence, this being a negative approach to the problem covered in 835a by allowing only reasonable force.

Section 836. Arrest by Peace Officers. (Arrest Under Warrant or Without Warrant in Certain Cases Authorized.)

This section is to be amended by changing only the authorization to arrest without warrant by incorporating the decision of the Supreme Court of California in Coverstone v. Davies, 38 Cal. 2d 315, into the statutory authorization to arrest for a misdemeanor, and to cover in one subsection all of the grounds heretofore allowed for arrests for a felony; to provide authorization for an arrest of a person who has actually committed a felony regardless of what offense the officer may have believed him to have committed prior to the arrest. Authorization for this law is found in People v. Young, 137 Cal. 699.

Subsection 2 of the present Penal Code Section 836 provides that an officer may make an arrest of a person who has committed a felony, although not in the presence of an officer. It is not clear from this section whether or not this is an embodiment of the common law rule which provides that an officer may make an arrest of a person who has in fact committed a felony although the officer has no probable cause for believing that he has committed

a felony. For that reason it is felt that this section needs clarification. An expression of the common law rule is found in Baltimore and O. R. Co. v. Cain (1895) 81 Md. 87, 31 Atl. 801, 28 L.R.A. 688.

Section 840. (When Arrest May Be Made, Felony, Misdemeanor.)

This section is felt to relate only to arrests under warrant and perhaps some redrafting could clarify that thought. The amendments here suggested are to include an attempt as well as the actual commission, and to include the rule of Coverstone v. Davies, 38 Cal. 2d 315, on misdemeanor arrests where the officer has probable cause to believe that the misdemeanor is being committed in his presence.

Section 842. Warrant Must Be Shown, When.

This amendment is requested solely to change the word "required" to "requested". It is noted that one of the synonyms of "required", although antiquated, is "requested". This amendment is suggested for the purpose of modernizing the language.

Section 844. Door or Window May Be Broken In Making Arrest, When.

This amendment adds the words "with or without a warrant", in order to clarify the application of this section to arrests of all types. This amendment is felt necessary because of the place where this appears following other sections on arrest under warrants. The added words are simply to insure its application to arrests with or without a warrant.

Section 845. The same reasons given for the amendment to Section 844 apply to the proposed amendment to Section 845.

Section 849. (Person Arrested Without Warrant Shall Be Taken Before Nearest Magistrate: Complaint to be Laid.)

Two amendments are proposed to this section, the first to add the words "if not otherwise released", in order to be consistent with a proposed new section heretofore discussed allowing release prior to booking; the second change to add the words "and if reasonably possible within two court days after his arrest," in order to conform to the present language of Section 825 which reads, "in any event within two days, excluding Sundays and holidays". The change in the words "in any event" to "if reasonably possible" would take care of any possible emergency facing the community wherein arraignment might reasonably be delayed for purposes of great importance.

An act to amend Sections 835, 836, 840, 842, 844, 845, 849 of, and to add Sections 832, 833, 834a, 835a, 842a and 849a to the Penal Code, relating to arrests.

The People of the State of California do enact as follows:

SECTION 1. Section 835 of the Penal Code is amended to read:

835. How an arrest is made and what restraint allowed. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

SEC. 2. Section 836 of the Penal Code is amended to read:

836. Arrests by peace-officers: (Arrest under warrant or without warrant in certain cases authorized). A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence, misdemeanor whenever:

(A) He has reasonable ground to believe that the person to be arrested has committed a misdemeanor in his presence.

2. When a person arrested has committed a felony, although not in his presence. For a felony whenever:

(A) He has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

(B) A felony has been committed by the person to be arrested although before making the arrest the officer has no reasonable ground to believe the person committed it.

3r When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4r On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5r At night, when there is reasonable cause to believe that he has committed a felony.

SEC. 3. Section 840 of the Penal Code is amended to read:

840. (When arrest may be made: Felony: Misdemeanor.) If the offense charged is a felony, the arrest may be made on any day and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night unless upon the direction of the magistrate, endorsed upon the warrant, except when the offense is committed, or attempted, in the presence of the arresting officer, or when the arresting officer has reasonable cause to believe a misdemeanor is being committed or attempted in his presence.

SEC. 4. Section 842 of the Penal Code is amended to read:

842. Warrant must be shown, when. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if ~~required~~, requested.

SEC. 5. Section 844 of the Penal Code is amended to read:

844. (Door or window may be broken in making arrest, when.) To make an arrest, with or without a warrant, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

SEC. 6. Section 845 of the Penal Code is amended to read:

845. Same: (Breaking door or window in leaving lawfully house entered to make arrest.) Any person who has lawfully entered a house for the purpose of making an arrest, with or without a warrant, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

SEC. 7. Section 849 of the Penal Code is amended to read:

849. (Person arrested without warrant to be taken before nearest magistrate: Complaint to be laid.) When an arrest is made without a warrant by a peace-officer or private person, the person arrested, if not otherwise released, must, ~~without unnecessary delay~~, be taken before the nearest or most accessible magistrate in the county in which the arrest is made without unnecessary delay, and if reasonably possible within two court days after his arrest, and a complaint stating the charge against the person, must be laid before such magistrate.

SEC. 8. Section 832 is added to the Penal Code, to read as follows:

832. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions may be detained and further questioned and

investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested for a public offense.

SEC. 9. Section 833 is added to the Penal Code, to read as follows:

833. Searching for Weapons. Persons Who Have Not Been Arrested.

A peace-officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in section 832, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person.

SEC. 10. Section 834a is added to the Penal Code, to read as follows:

834a. Resisting Arrest.

If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest.

SEC. 11. Section 835a is added to the Penal Code, to read as follows:

835a. Arrest--Permissible Force.

1. A peace officer who has reasonable cause to believe that the person to be arrested has committed a felony, or has committed a misdemeanor in his presence, may use reasonable force to effect

the arrest, to prevent escape, or to overcome resistance.

2. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

SEC. 12. Section 842a is added to the Penal Code, to read as follows:

842a. Arrest under a warrant not in officer's possession. An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but if the person arrested so requests it, the warrant shall be shown to him as soon as practical.

SEC. 13. Section 849a is added to the Penal Code, to read as follows:

849a. Release of Persons Arrested.

(1) Any officer in charge of a police department or any officer delegated by him may release, instead of taking before a magistrate, any person who has been arrested without a warrant by an officer of his department whenever:

(A) He is satisfied either that there is no ground for making a criminal complaint against the person or that the person was arrested for drunkenness and no further proceedings are desirable.

(B) The person was arrested for a misdemeanor and has signed an agreement to appear in court at a time designated, if the officer is satisfied

that the person is a resident of the state and
will appear in court at the time designated.

(2) A person released as provided in this section shall
have no right to sue on the ground that he was released without
being brought before a magistrate.

EXHIBIT IX

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
Morton L. Barker, Judge

January 13, 1956

Mr. H. Allen Smith
Chairman, Assembly Judiciary Committee
400 Security Title Insurance Building
530 West Sixth Street
Los Angeles 14, California

My dear Allen:

I am very sorry that it was not possible for me to appear before your Committee yesterday. As I informed you I had a dental appointment at 12:30 and had to return for my afternoon calendar in Van Nuys at 1:30. I am sure that probably everything that I might have said was covered by the other speakers.

For your information, I enclose a copy of the statement which I had proposed reading.

Very sincerely yours,

/s/ Morton L. Barker

MLB:mb

Morton L. Barker

Enc.

Chairman Smith and Committee Members:

I appear here today primarily in the capacity of citizen, rather than as Judge. From the imposing array of witnesses whom you have invited to appear before you, I am certain that all that I have to say has either been said and will be said a great many times during this hearing and probably a great deal better than I can say it. Despite this fact, I should like to offer several comments for your consideration.

The matter you are considering is not one of law, but involves a question of public policy. One's answer to this question depends entirely on his social and political viewpoint. By political I do not mean partisan politics, but rather one's feelings as to the obligations of government to the individual citizen weighed against the general public interest in the detection and suppression of crime.

There appears to be no doubt but what so far as constitutional limitations are concerned, the exclusionary rule is not mandatory but is governed entirely from the socio-political viewpoint of the person or body considering the matter.

Objectively stated, the question is this: Has the conduct of police officers in matters of unlawful searches reached such a state as to require the Courts to refuse to consider evidence which was obtained contrary to established rules of law, even tho such evidence establishes the guilt of the person in whose possession it was found. From the language of the Cahan Case, it is apparent that it was concern over such a state which influenced the Court

in its decision because it is declared: "..... the constitutional provisions make no distinction between the guilty and the innocent and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the Court is not concerned solely with the rights of the Defendant before it however guilty he may appear, but with the constitutional right of all the people to be secure in their homes, persons and effects."

My opposition to the exclusionary rule is based on three grounds:

1. There has always existed a sufficient restraining influence against the invasion of constitutional rights of innocent persons, by police officers in the form of liability for damages in a civil action for such unlawful invasion;
2. The number of instances of the invasion of constitutional rights of innocent victims is so small that, considering the public interest in the detection and suppression of crime, the general welfare demands that the exclusionary rule not be applied;
3. Because the narcotic problem has reached such alarming proportions and because of the secret and devious methods used by narcotic dealers and users, special rules of evidence should be adopted in prosecutions for this type of offense.

If we should assume that out of every 100 persons who were illegally searched (as defined in the Cahan decision), only one of such searches failed to produce proof of the guilt of the

person searched, would this establish such a threat to constitutional liberties as to require the suppression of the evidence obtained by such search?

I know of no way in which the numbers involved in the last question can be established but based on my experience, I would say that the figure of one out of 100 is conservative.

Would it be in the general public interest to permit the 99 guilty persons to go free in order to protect the one innocent person?

It is the policy of this State to require that proof of the guilt of a defendant in a criminal proceeding be established beyond a reasonable doubt under the theory that it is better that a number of guilty persons escape punishment than for one innocent person to be convicted.

This policy has no relation to the problem before you. In the case of so-called unlawful searches, the evidence produced by the search is direct proof pointing to the guilt of the person searched and in the great majority of cases conclusively establishes such guilt.

It is to be noted that objection is not made in behalf of the persons whose guilt was established by the unlawful searches. The sole concern of those who argue for the exclusionary rule is the protection of the innocent victims of unlawful searches, of the one in 100 searches.

If the rights of those innocent victims could only be protected by the suppression of evidence obtained by illegal methods, the argument with respect to weighing the conflicting questions of

public policy involved in the detection and suppression of crime versus the constitutional right of the innocent victim would be made stronger in favor of the exclusionary rule.

But the innocent victim has means whereby to redress the wrong done him for the invasion of his constitutional rights. He may recover money damages for such invasion.

Is the exclusionary rule necessary to secure the Constitutional rights of all citizens or as Dean Wigmore says, is the exclusion of such evidence based upon "misguided sentimentality" as set forth in Justice Spence's dissenting opinion of the Cahan Case.

To suppose the existence of that chaotic state where there are widespread invasions of constitutional rights, it would be necessary first to assume that the Courts were helpless to prevent such conduct. To state the proposition is to answer it.

It has been my experience, as I am sure is the case of all others appearing before you, that the exclusionary rule has been invoked almost entirely in cases involving narcotics and bookmaking. So far as I can recall, all of the reported cases from the Appellate Courts in this jurisdiction have dealt with these two types of criminals. In my opinion, because of the extreme difficulty of apprehension encountered in these types of cases, they should receive different treatment.

When it is considered that dealings of narcotics are made on street corners, in bars and often in the early morning hours and without any opportunity for prior information on the subject by the police officers, it is manifestly impossible for them to obtain search warrants in all cases. It is principally through the use of

informers that information concerning a transaction involving narcotics is obtained and then often during the hours when the Courts are not in session. When bookmakers engage in such acts as recording their bets on the enameled surface of a stove with a crayon and shortly thereafter erasing them with a solvent, or using the so-called magic slates on which the writing can be instantly removed by lifting a sheet of cellophane, what opportunity is there for an officer to obtain a search warrant.

It is my opinion that if the exclusionary rule were not applied to bookmaking and narcotic cases, the work of the police officers would be greatly facilitated although I urge that the rule be entirely set aside by legislative action.

So far as I am concerned, it gives me a feeling of frustration to order the exclusion of evidence which in itself establishes, beyond question, the guilt of a defendant.

May I close with the statement that it is my opinion that there is no threat to our constitutional liberties thru unlawful searches and seizures and that whenever an unlawful search and seizure is made, an adequate remedy is available. I, therefore, urge that legislation be adopted for the purpose of expressing what I am sure, is the opinion of all the law-abiding citizens of this State, to-wit, the restoration by Statute of the rule with regards to the admission of evidence as it existed before the Cahan Decision.

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530 WEST 6TH ST LOSA=

RESOLUTION JANUARY 19 1956

FIFTY-FIVE CHIEFS OF POLICE ZONE 6, UNANIMOUSLY PASSED THE
FOLLOWING RESOLUTION TODAY.

WHEREAS THE RECENT CALIFORNIA SUPREME COURT DECISIONS ON
SEARCH AND SEIZURE HAVE SERIOUSLY HAMPERED LAW ENFORCEMENT OFFICERS
IN THE CONTROL OF ALL TYPES OF CRIME:

THEREFORE BE IT RESOLVED THAT HIS EXCELLENCY THE GOVERNOR OF
THE STATE OF CALIFORNIA, INTRODUCE AND RECOMMEND THE PASSAGE OF A
BILL AT THE FORTHCOMING SPECIAL SESSION OF THE LEGISLATURE RESTORING
THE ADMISSIBILITY OF SO-CALLED "ILLEGALLY OBTAINED EVIDENCE" AT
LEAST IN NARCOTIC CASES.

BE IT FURTHER RESOLVED THAT IT IS VERY DESIROUS OF RESTORING
THE ADMISSIBILITY OF SO-CALLED "ILLEGALLY OBTAINED EVIDENCE" IN ALL
TYPES OF CRIMINAL CASES IF CRIME IS TO BE KEPT UNDER CONTROL IN
CALIFORNIA BUT THAT IT IS MANDATORY TO RESTORE THIS RIGHT IN NARCOTIC
CASES IF THE PRESENT INTOLERABLE SITUATION IS TO BE ALLEVIATED.

BE IT FURTHER RESOLVED THAT COPIES OF THIS RESOLUTION BE
FORWARDED TO HIS EXCELLENCY GOVERNOR KNIGHT AND THE HONORABLE
H ALLEN SMITH.

CHIEF J A BENNETT RIVERSIDE POLICE DEPARTMENT COMMITTEE FOR
CHIEFS OF ZONE 6

CHIEF A E JANSEN SAN DIEGO POLICE DEPARTMENT COMMITTEE FOR
CHIEFS OF ZONE 6

CHIEF WYATT D BRIGGS EL CENTRO POLICE DEPARTMENT COMMITTEE
FOR CHIEFS OF ZONE 6=

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H. ALLEN SMITH, CHAIRMAN JUDICIARY COMMITTEE 13 PM 1 06

530 West 6 ST LOSA

FIFTY-TWO CHIEFS OF POLICE, ZONE 2, UNANIMOUSLY PASSED THE FOLLOWING
RESOLUTION TODAY.

WHEREAS THE RECENT CALIFORNIA SUPREME COURT DECISIONS
ON SEARCH AND SEIZURE HAVE SERIOUSLY HAMPERED LAW ENFORCEMENT
OFFICERS IN THE CONTROL OF ALL TYPES OF CRIME;

THEREFORE BE IT RESOLVED THAT THE ASSEMBLY JUDICIARY COMMITTEE
INTRODUCE AND RECOMMEND THE PASSAGE OF A BILL AT THE FORTHCOMING
SPECIAL SESSION OF THE LEGISLATURE RESTORING THE ADMISSIBILITY OF
SO-CALLED "ILLEGALLY OBTAINED EVIDENCE" AT LEAST IN NARCOTIC CASES.

BE IT FURTHER RESOLVED THAT IT IS VERY DESIROUS OF RESTORING
THE ADMISSIBILITY OF SO-CALLED ILLEGALLY OBTAINED EVIDENCE IN ALL TYPES
OF CRIMINAL CASES IF CRIME IS TO BE KEPT UNDER CONTROL IN CALIFORNIA,
BUT THAT IT IS MANDATORY TO RESTORE THIS RIGHT IN NARCOTIC CASES
IF THE PRESENT INTOLERABLE SITUATION IS TO BE ALLEVIATED.

CHIEF W W VERNON OAKLAND POLICE DEPT CHAIRMAN
SPECIAL COMMITTEE ZONE 2

CHIEF CHARLES BROWN RICHMOND POLICE DEPT
MEMBER SPECIAL COMMITTEE ZONE 2

CHIEF DON WOODS SAN ANSELMO POLICE DEPT MEMBER
SPECIAL COMMITTEE ZONE 2

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